Supreme Court, U.S.
FILED
011873 JUN 24 2002
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No. ___

IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*,
Appellants,

v.

ROBERT C. JUBELIRER and MATTHEW J. RYAN, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

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JURISDICTIONAL STATEMENT

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178 pgs

QUESTIONS PRESENTED

1. Whether the district court erred in effectively concluding that members of a major political party may never state a claim of unconstitutional partisan gerrymandering, thereby nullifying this Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986).

2. Whether a State presumptively violates the Equal Protection Clause when it subordinates all traditional, neutral districting criteria to the overarching goal of drawing a congressional redistricting map that achieves maximum partisan advantage for members of one political party.

3. Whether a State exceeds its power under the Elections Clause, Article I, Section 4 of the Constitution, when it draws congressional district boundaries that ensure that candidates belonging to one political party will receive a supermajority of the State's congressional seats even if that party wins substantially less than a majority of the statewide vote.

PARTIES TO THE PROCEEDING

Appellants are Richard Vieth, Norma Jean Vieth, and Susan Furey. Appellees are Robert C. Jubelirer, Lieutenant Governor of Pennsylvania; Matthew J. Ryan, Speaker of the Pennsylvania House of Representatives; Mark S. Schweiker, Governor of Pennsylvania; Kim Pizzingrilli, Secretary of the Commonwealth; and Richard Filling, Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court is reported at 188 F. Supp. 2d 532, and is reprinted at J.S. App. 1a-33a.

JURISDICTION

The order of the three-judge district court granting final dismissal of Appellants' claim for injunctive relief from an alleged partisan gerrymander was entered on February 22, 2002. The notice of appeal was timely filed 60 days later, on April 23, 2002. *See* 28 U.S.C. § 2101(b). The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Article I, Section 4 of the United States Constitution provides, in pertinent part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

STATEMENT OF THE CASE

Appellants, who are Democratic voters from Pennsylvania, appeal the dismissal by a three-judge federal district court of their claim that Pennsylvania's newly enacted congressional district map is so biased in favor of Republicans that it constitutes an unconstitutional "partisan gerrymander." That ruling is one of a series of lower-court decisions since *Davis v. Bandemer*, 478 U.S. 109 (1986), holding that it is not enough for plaintiffs to show that a districting map severely "packs" and "fractures" voters of one political party and thus disproportionately favors candidates of another party. Although far from consistent with one another, these courts have all required plaintiffs to prove some harm in addition to the harm caused by a biased district map – for example, proof that members of the disfavored political party are being barred from organizing and campaigning for its candidates or a showing that the candidates favored by the map, when elected, would completely ignore constituents aligned with the disfavored party. Such an approach means that partisan gerrymandering, while justiciable in theory, is immune from legal challenge in actual practice, no matter how extreme the bias that is introduced into a districting scheme. Recognizing that

reality, lawmakers have "pushed the envelope" of partisan bias in the post-2000 round of redistricting, with Pennsylvania's map being just one of the most extreme. It is essential that this Court undertake plenary review in this case to rectify the situation by making clear that the harms caused by partisan gerrymandering are not wholly beyond judicial redress.

Following the 2000 census, the size of Pennsylvania's congressional delegation was reduced from 21 members to 19. Charged with creating new congressional districts to reflect the results of reapportionment, the Pennsylvania General Assembly began crafting a new district map in November 2001. Republican legislators, who constitute a majority in both houses of the General Assembly, introduced and ultimately passed a map on January 3, 2002.[1] That map became known as Act 1 after the governor signed it into law on January 7, 2002.

Act 1 was immediately controversial and received national attention as "the most partisan congressional gerrymander of this young century, and among the worst in the last several decades of the earlier millennium." Gregory M. Harvey, *Redistricting Plan Draws the Line Between Equal and Fair*, Legal Intelligencer, May 20, 2002, at 6. Act 1 would likely give Republicans a 14-5 or 13-6 supermajority in the Commonwealth's congressional delegation, even if, as usually occurs, Republican candidates receive less than half of the vote for Congress statewide. Moreover, in order to achieve this extreme level of partisan bias, the plan's authors sacrificed every traditional districting criterion – slashing through communities of interest, splitting precincts, municipalities, and counties, and producing a map

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[1] Although the map was passed on a party-line vote in the Pennsylvania Senate, its supporters were able to induce 42 Democrats to support it in the House.

that can only be described as a contorted mess. *See* J.S. App. 82a-85a.

For example, one heavily Democratic portion of Montgomery County (located in suburban Philadelphia) is extracted from relatively competitive District 13 and connected to heavily Republican District 8 by means of a several-mile-long, 400-foot-wide connecting isthmus. Similarly, the Pennsylvania Commonwealth Court described nearby District 6 as "an irregular, 'dragon-shaped' district that covers three counties in southeast Pennsylvania and includes several wholly distinct, unconnected communities of interest." *Id.* at 84a. Perhaps worst of all, intertwined Districts 12 and 18, which wander all over southwestern Pennsylvania, split 8 counties and 39 municipalities as they carefully separate Republican-leaning and Democratic-leaning neighborhoods along their jagged borders. Overall, the new map increased the number of municipal splits in Pennsylvania from 13 to 59, and the number of county splits from 18 to 25.

In addition, although Pennsylvania lost just two congressional seats, Act 1 paired six incumbents in three different districts. In two cases, pairs of Democratic incumbents were matched against one another. In a third district, a Democratic incumbent was placed with a Republican in a district that favors the Republican.

On January 11, 2002, Appellants Richard Vieth, Norma Jean Vieth, and Susan Furey brought this action in federal court, raising two primary claims. First, Appellants claimed that Act 1 creates congressional districts of needlessly unequal population in violation of Article I, Section 2 of the U.S. Constitution. *Id.* at 131a. Second, Appellants claimed that Act 1 was a political gerrymander that deprived Pennsylvania's Democratic voters of the rights guaranteed to them by the Equal Protection Clause, as well as Article I,

Section 4 of the U.S. Constitution. *Id.* In support of the latter claim, they pointed in their complaint to the huge disparity between votes for Congress statewide (generally slightly favoring the Democrats) and electoral outcomes deliberately created by the map drawers (a 14-5 or 13-6 Republican advantage). *Id.* at 126a-127a. They also relied on the disparate pairing of incumbents and further alleged that the result of the map would be that the will of the political majority would be consistently frustrated over the course of the next decade. *Id.* at 124a, 127a.

At approximately the same time, a different set of plaintiffs filed suit in state court, claiming that the partisan bias of the districting plan violated the Pennsylvania Constitution. The Pennsylvania Supreme Court exercised original jurisdiction over the case – called *Erfer v. Pennsylvania* – and directed the Pennsylvania Commonwealth Court to hold an immediate trial and propose findings of fact and conclusions of law. The Commonwealth Court found that the plan enacted by the Pennsylvania General Assembly would produce a 14-5 or 13-6 Republican advantage in the State's congressional delegation, even if Republican candidates received less than one-half of the votes cast. It also detailed the effects of incumbent pairings in the map as well as the ways in which the map drawers ignored such traditional districting criteria as compactness and respect for communities of interest and municipal boundaries where necessary to achieve their partisan goals. *Id.* at 82a-85a.

Ultimately, however, the Pennsylvania Supreme Court rejected the plaintiffs' state-law claims in a ruling that presaged the federal court ruling now on appeal. Basing its analysis of state law on this Court's decision in *Davis v. Bandemer*, the state court held that the plaintiffs' claims were deficient because they had not gone beyond proving

"disproportionate results" and had not shown that Democrats would be "shut out of the political process." *Id.* at 65a.

Chief Justice Zappala dissented. He commented: "If the record of this case does not establish unconstitutional political gerrymandering, *no such claim exists*. This Court should not then waste its valuable judicial resources entertaining illusory claims that, in reality, can never be established." *Id.* at 113a (emphasis added).

Meanwhile, back in federal court, the three-judge district court granted the Commonwealth's motion to dismiss Appellants' political gerrymandering claims. The court examined those claims entirely within the framework set forth by the plurality opinion in *Davis v. Bandemer*, never acknowledging (despite a motion for reconsideration) Appellants' separate Article I arguments. The court held that, in order to state an equal protection claim of partisan gerrymandering, Appellants must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 20a. (quoting *Bandemer*, 478 U.S. at 127 (plurality opinion)). The court determined that Appellants satisfied the first two prongs of this test: namely, (1) that Appellants, and all Pennsylvania citizens who vote for Democrats, constitute an identifiable political group, and (2) that Appellants' allegations that the General Assembly Republicans "prevented all Democratic input on Act 1 in order to establish a Republican super-majority in Pennsylvania's congressional caucus" were sufficient to establish the Assembly's discriminatory intent. *Id.* at 21a.

The district court held, however, that Appellants did not allege sufficient discriminatory effects to satisfy the third prong of the *Bandemer* test. The district court held that the discriminatory-effects analysis itself involved another two-pronged showing: (1) that the challenged map would

produce disproportionate election results, and (2) that "the electoral system is arranged in a manner that will consistently degrade a voter's, or group of voters', influence on the political process as a whole." *Id.* at 21a-22a (quoting *Bandemer*, 478 U.S. at 132 (plurality opinion)). Observing that *Bandemer* itself "offers little concrete guidance" with respect to this second prong, the district court instead relied on *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988) (three-judge court), *summarily aff'd*, 488 U.S. 1024 (1989).

Adopting *Badham*'s interpretation of the second prong of the discriminatory-effects test, the district court held that Appellants could not establish Act 1's actual discriminatory effects because they could not allege "facts indicating that as a result of Act 1 [they] will be completely shut out of the political process." J.S. App. 22a. More specifically, the court faulted Appellants for failing to allege "that anyone has ever prevented, or will ever prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern." *Id.* (citing *Badham*, 694 F. Supp. at 670). Without such evidence of "impediments to . . . full participation in the 'uninhibited, robust, wide-open' public debate on which our political system relies," the district court held that Appellants could not state an equal protection claim of partisan gerrymandering. *Id.* (quoting *Badham*, 694 F. Supp. at 670). In other words, the court held that the highly biased map passed by the State would become unconstitutional only if it were accompanied by *entirely separate and independently unconstitutional* limitations on Democrats' ability to vote, campaign for candidates, and speak out about political issues.

Appellants' one-person, one-vote claim was not dismissed. After a two-day trial, the district court entered

judgment in favor of Appellants on that claim.[2] At trial, Appellants demonstrated that Act 1's population deviation of 19 persons was unjustified by *any* neutral, consistently applied redistricting policy. Instead, the deviation reflected Republican legislators' unwillingness to make even minor changes in a carefully calibrated map.

Based on this evidence, the district court found that the non-partisan justification for the 19-person population deviation offered by the defendants – minimizing split precints – was a "mere pretext" and that the deviation therefore was not constitutionally justified under *Karcher v. Daggett*, 462 U.S. 725 (1983). J.S. App. 41a. Specifically, the district court found that, of all the maps introduced at trial, Act 1 was the plan that contained the least compact districts, and split the most counties and municipalities. *Id.* at 42a-43a. The court also found that "[t]o the extent that Act 1 retains the cores of prior districts, it does so only for districts containing Republican incumbents." *Id.* at 43a. And finally, the court found that Act 1 "failed most miserably" in terms of avoiding contests between incumbent Representatives: Although Pennsylvania's loss of two congressional seats required the pairing of only two sets of incumbents in the 2002 elections, Act 1 pairs *three* sets of incumbents, in a manner which favors Republican candidates in each instance, while also creating an open seat that favors a Republican candidate. *Id.*[3]

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[2] Appeals from that judgment are now pending before this Court as Nos. 01-1817 and 01-1823.

[3] The district court later stayed the effect of its ruling, allowing primary elections to go forward as scheduled using the original district lines. The General Assembly had passed a new remedial map with districts that have much the same political impact as in the originally enacted plan.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court held in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering claims are justiciable. That decision was a watershed. Prior to *Bandemer*, the only judicially enforced constitutional limit on political discrimination in redistricting was the "one person, one vote" mandate. But as Justice Harlan observed in 1969, such a rule "of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues." *Kirkpatrick v. Preisler*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting); *see also Karcher v. Daggett*, 462 U.S. 725, 776 (1983) (White, J., dissenting) ("There is now evidence that Justice Harlan was correct to predict that '[e]ven more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs.'") (citation omitted). By recognizing a limit to political discrimination in redistricting other than the rule of population equality, *Bandemer* promised to check partisan gerrymandering, which Justice White deemed "a far greater potential threat to equality of representation." *Karcher*, 462 U.S. at 776 (citation and internal quotation marks omitted).

That promise, as the district court's decision demonstrates, has yet to be realized. It is difficult to imagine a more extreme partisan gerrymander than Act 1, a map that jettisons all traditional, neutral districting criteria in order to ensure that one political party will win two-thirds or more of a State's congressional seats, even if that party receives less than half of the popular vote. The level of partisan skew in this case goes far beyond the map challenged in *Bandemer* itself. But despite this Court's clear indication in *Bandemer* that state legislatures may not consign political majorities to minority status, and despite Appellants' very specific

allegations that Act 1 was designed to accomplish that goal, the district court held that Appellants had failed to state a valid claim.

In so holding, the district court relied not on *Bandemer* itself, but on the decision of the first lower court to apply *Bandemer* – *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988) (three-judge court), *summarily aff'd*, 488 U.S. 1024 (1989). The *Badham* district court enunciated a test for unconstitutional partisan gerrymandering that goes far beyond what this Court said in *Bandemer*. Application of that test renders it virtually impossible for voters affiliated with a major political party to state a political gerrymandering claim, because it requires them to demonstrate *not only* severe bias in a districting map *but also* exclusion from any opportunity to participate in the political process through voting, organizing, and campaigning for office. Under that early misinterpretation of *Bandemer*, which has come to be very influential among lower courts, every claim of political gerrymandering – with one exception, *see infra* p. 21 – has failed.

But there has never been a clearer need for some enforceable limit on the ability of legislators to dilute the votes of a class of citizens based on their political viewpoint. Since *Bandemer* was decided, the advance of computer technologies has made it increasingly easy for legislatures to gerrymander with great precision, excising and shifting just a few politically undesirable voters at a time. As a result, in the current round of redistricting, legislators in a number of key States, including Pennsylvania, Michigan, and Florida, have drawn congressional district maps with remarkable levels of partisan bias. In so doing, they have simultaneously undermined any assumption that partisan gerrymandering is a "self-limiting enterprise" because efforts to maximize partisan advantage will cut the margins too thin, weakening a

party's safe seats. *See Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring in the judgment). In Michigan, for example, Republican lawmakers managed to draw an extremely partisan map *while retaining every one of their existing safe seats and creating two additional safe seats*. The result was a map in which 10 out of 15 districts favor Republican candidates (even when they receive less than half the votes statewide) and 14 out of 15 congressional districts are noncompetitive. What is true in Michigan has been true across the Nation: the post-2000 round of redistricting has produced the fewest competitive seats in more than 200 years of congressional history.[4] In short, this round of redistricting demonstrates that political gerrymandering is *not* a self-limiting enterprise, and that enforcement of *Bandemer* is more important today than ever.

Given the basic constitutional rights that are affected when legislatures intentionally dilute the voting power of a group of voters because of their disfavored political views, the Court should take this opportunity to clarify that extreme partisan gerrymandering is not only justiciable in theory but remediable in actual practice. The *Badham* rule – requiring proof of discriminatory effects beyond severe vote dilution

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[4] *See, e.g.*, Editorial, *Democracy Denied*, Richmond Times-Dispatch, Mar. 17, 2002, at E2 ("Precision redistricting – i.e., gerrymandering – has made 380 districts safe for one party or the other. Citizens will cast ballots in November, but their votes effectively were counted when the pols drew the lines."); Juliet Eilperin, *House Democrats' Climb Gets Steeper: Party Lacks Rallying Cry as Redistricting, Incumbency Cut Competitive Races*, Wash. Post, Apr. 2, 2002, at A1 ("A decade ago, there were roughly 100 competitive races following redistricting; this year there will be 30 to 40, perhaps even fewer . . . ."); *see also* Alison Mitchell, *Redistricting 2002 Produces No Great Shake-Ups*, N.Y. Times, Mar. 13, 2002, at A20 ("With Congressional redistricting almost complete, the once-a-decade redrawing of the nation's political map is turning out to favor incumbents to an unusual degree, making many of the House's swing seats into safer territory for one party or the other.").

based on political beliefs, causing consistent frustration of majority will – simply makes no sense.

The district court's adoption of the *Badham* test was even more indefensible because it failed to recognize the significance of more recent decisions by this Court that help clarify the standard for identifying an unconstitutional partisan gerrymander. *First*, this Court has held that a districting plan is presumptively unconstitutional if the map drawers allowed racial considerations to predominate over all neutral districting principles. *See Shaw v. Reno*, 509 U.S. 630 (1993) (overreliance on racial considerations in redistricting presumptively violates the Equal Protection Clause); *Miller v. Johnson*, 515 U.S. 900 (1995) (same). The logic of these decisions would also mean that a State's subordination of all neutral districting principles to a "predominant" aim of maximizing partisan advantage presumptively violates the Equal Protection Clause.

Second, the Court has made clear that, in the context of *congressional* redistricting, as opposed to state-legislative redistricting, Article I of the U.S. Constitution imposes more stringent limits on the power of the state legislatures to manipulate electoral outcomes. The Court has said that States may not use their power to regulate federal election procedure to dictate electoral outcomes, to advantage one class of candidates over another, or to frustrate the will of the majority of voters. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001). The same principles require stringent limits on the power of legislatures to predetermine the results of congressional voting through strategic line-drawing.

The errors committed by the district court in this case, and others like it, demonstrate a pressing need for this Court to clarify and enforce the constitutional norm it first

announced in *Bandemer* – a norm necessary to ensure fairness and competitiveness in congressional elections.

I. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF *BANDEMER*.

The controlling plurality opinion in *Davis v. Bandemer* established that a plaintiff who alleges "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" states a claim of unconstitutional political gerrymandering. 478 U.S. at 127. While the *Bandemer* Court recognized that there is no guarantee of proportional representation in our winner-take-all political system, it also recognized that there is a difference between a redistricting plan that results in moderately disproportionate representation and a plan designed to ensure that a party that wins a *majority* of the vote statewide will win far less than a majority of the seats for an entire decade. Thus, *Bandemer* emphasized three factors in assessing whether discriminatory effects are unconstitutional: (1) the likely severity of the partisan skew; (2) the likely duration of the skew; and (3) whether that skew is sufficient to prevent a majority of the voters from exercising control. The Court thus explained that, in order to make out a claim of partisan gerrymandering, a plaintiff must show that "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively," and that this can be "supported by evidence of continued frustration of the will of a majority of the voters." *Id.* at 133 (plurality opinion). In other words, redistricting must achieve "a level of parity between votes and representation sufficient to ensure . . . that majorities are not consigned to minority status," in keeping with "our general majoritarian ethic and the objective of fair and adequate representation." *Id.* at 126 n.9 (majority opinion).

A. Appellants Stated a Valid Claim Under *Bandemer*.

Appellants' allegations in this case were sufficient to establish Act 1's discriminatory effects. Appellants alleged that extremely disproportionate results are projected to obtain under Act 1: although a slight majority of Pennsylvania voters have favored Democratic candidates in recent federal elections, Act 1 is likely to produce a congressional delegation that consists of 13 or 14 Republicans and only 5 or 6 Democrats. They further alleged that this partisan skew would be locked in for at least a decade, that it would degrade the ability of the Democrats to field quality candidates and raise funds, and that it was achieved through complete disregard of the constraints imposed by adherence to traditional, neutral districting principles. J.S. App. 124a-131a. To be sure, establishing the discriminatory effects of a partisan gerrymander requires a showing of "more than a *de minimis*" effect on the plaintiffs, since "[d]istrict-based elections hardly ever produce a perfect fit between votes and representation," and "[i]nviting attack on minor departures from a supposed norm would too much embroil the judiciary in second-guessing" legislative plans. *Bandemer*, 478 U.S. at 133-34 (plurality opinion). But here, the predictable effect of Act 1's discrimination against Democratic voters could not possibly be considered a "minor departure" from what might be considered a rough fit between votes and representation.

The level of partisan skew in this case contrasts dramatically with the facts present in *Bandemer*, where the evidence had indicated that Democrats, with 51.9% of the votes statewide, received 43% of the seats in the House, and 48% of the seats in the Senate. 478 U.S. at 134. Moreover, in *Bandemer*, "the District Court [had] declined to hold that the 1982 election results were the predictable consequence[] of

the 1981 Act." *Id.* at 135. Here, despite the fact that Democrats, by any measure, constitute at least half of Pennsylvania voters in congressional elections, *see* J.S. App. 124a, the predictable result of Act 1 is that Republicans will win more than twice as many seats as the Democrats in Pennsylvania's congressional delegation, *see id.* at 125a-126a, and will hold that advantage for at least a decade, *see id.* at 127a.

Despite *Bandemer*'s clear indication that a State may violate the Equal Protection Clause when it consigns a political majority to minority status, the district court dismissed an equal protection challenge to a map that dispenses with all neutral districting criteria – including compactness, preservation of communities of interest, and avoiding contests between incumbent representatives – in order to engineer districts that relegate a majority of Pennsylvania's voters to a minority of one-third (or less) of the State's congressional seats. In so doing, the district court held that voters cannot state a constitutional violation unless they can show that they have been "shut out of the political process" in the Commonwealth of Pennsylvania. That standard, however, effectively makes it impossible for voters affiliated with a disfavored political majority to state a claim of political gerrymandering.

B. The District Court Erred in Relying on Prior Lower-Court Rulings That Are Factually Distinguishable and Articulate a Nonsensical Legal Standard.

In adopting a construction of *Bandemer* that would essentially overrule it, the district court relied entirely on *Badham v. Eu*, the first post-*Bandemer* case to address a partisan gerrymandering challenge. That reliance was misplaced. The level of discriminatory effects in this case stands in sharp contrast with the facts of *Badham*, where the

alleged partisan gerrymander resulted in a difference of 10.1 percentage points between votes and seats in one election and just 3.2 percentage points in the next election – results that appeared to be neither grossly disproportionate nor consistent across elections. *Badham*, 694 F. Supp. at 670. Here, Appellants alleged that Act 1 would produce a *consistent* gap of approximately 20 percentage points between votes and seats. That gap satisfies the discriminatory effects requirement.

To the extent that *Badham*'s reasoning suggests a contrary result, it is important to note that it is *Bandemer*, not *Badham*, that controls this case. Although this Court summarily affirmed *Badham*, it has never endorsed its reasoning. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (describing the limited precedential value of summary affirmances).[5] Indeed, *Badham*'s reasoning directly conflicts

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[5] This Court's other summary affirmances in political gerrymandering cases are equally distinguishable. None of those cases involved the level of discriminatory effects presented in this case, where one party in control of both the legislative and executive branches of state government used that power to enact a plan likely to *consistently frustrate the will of the majority of voters*. *See Pope v. Blue*, 809 F. Supp. 392, 396 (W.D.N.C.) (three-judge court) (dismissing for failure to state a claim allegations that the legislature's creation of two Democratic-leaning majority-minority districts would result in a 9 to 3 Democratic majority, although Republicans accounted for one-third of state voters), *summarily aff'd*, 506 U.S. 801 (1992); *Holloway v. Hechler*, 817 F. Supp. 617, 628 (three-judge court) (S.D. W. Va. 1992) (allegations that the state legislature had purposefully drawn a map that would protect incumbent legislators), *summarily aff'd*, 507 U.S. 956 (1993); *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 409-10 (D. Md. 1991) (three-judge court) (Niemeyer, J., dissenting) (allegations that a redistricting map was drawn to protect senior incumbent representatives), *summarily aff'd*, 504 U.S. 938 (1992); *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662, 669 (N.D.N.Y.) (three-judge court) (per curiam) (redistricting plan allegedly disadvantaging Republicans in State

with *Bandemer*'s holding. The *Badham* court dismissed Republican voters' challenge to California's congressional redistricting plan on the ground that the Republicans had not alleged sufficient discriminatory effects. Specifically, the *Badham* court faulted the Republicans for their failure to allege

> that California Republicans have been "shut out" of the political process . . . [or] that anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have ever been, any impediments to their full participation in . . . public debate . . . . Particularly conspicuous by its absence is any allegation that plaintiffs' interests are being "entirely ignore[d]" by their congressional representatives.

694 F. Supp. at 670 (internal citations omitted). The *Badham* court thus announced an "effects" standard that goes far beyond *Bandemer*: a redistricting map is unconstitutional only if it *silences* candidates and voters and leads legislators to ignore the interest of the opposing party's voters *entirely*.

The *Badham* decision was the first, but certainly not the last, to misinterpret *Bandemer* in this way. Other courts have likewise required plaintiffs to show that a particular redistricting map shuts them out of the political process as a whole by demonstrating that a redistricting plan interferes with internal party processes, such as voter registration, organizing, voting, fundraising, and campaigning. *See, e.g.*, *Pope v. Blue*, 809 F. Supp. 392, 397 (W.D.N.C.) (three-judge court), *summarily aff'd*, 506 U.S. 801 (1992). Some courts

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Assembly resulted from political compromise that allowed the Republicans to create a Senate plan in which they were in the majority), *summarily aff'd*, 506 U.S. 1017 (1992).

have also suggested that a plaintiff must show that the challenged redistricting plan eliminates *all* seats held by members of the disfavored party. *See, e.g., id.*

To be sure, a number of courts have criticized *Badham* for creating a standard that, in effect, makes it impossible for a major political party to state a claim of unconstitutional political gerrymandering. *See O'Lear v. Miller*, No. 01-72584-BC, 2002 WL 1052046, at *4 & n.4 (E.D. Mich. May 24, 2002) (three-judge court) (criticizing *Badham* for requiring plaintiffs to show *both* "complete exclusion from the political process" *and* "that elected officials would be wholly indifferent to plaintiffs' interests"); *White v. Alabama*, 867 F. Supp. 1571, 1575 (M.D. Ala. 1994) (criticizing *Badham* for requiring evidence of interference with internal party processes or participation in public debate, or the indifference of elected officials to the concerns of members of the disfavored party); *Terrazas v. Slagle*, 821 F. Supp. 1162, 1173 (W.D. Tex. 1993) (three-judge court) (per curiam) (criticizing *Badham* for requiring a showing that members of the disfavored party would be "entirely ignored" by their representatives).

But these courts, too, have required showings that make it effectively impossible for a member of a major political party to state a partisan gerrymandering claim. They have held, for example, that a redistricting map for a particular political office is immune from challenge if members of the disfavored party hold other state or federal offices, including offices in entirely separate branches of government. *See, e.g., White*, 867 F. Supp. at 1575 (requiring evidence that challenged at-large system for electing state appellate judges diluted plaintiffs' voting strength in the state political system as a whole, and not just in the appellate judicial system). Or they have required a showing that a particular redistricting map turns plaintiffs into "political pariahs," such that they

cannot "over the long haul counteract [partisan gerrymandering] through [their] influence in another relevant political structure or structures." *Terrazas*, 821 F. Supp. at 1174. The *Terrazas* court, for example, deemed the fact that the Texas governor is elected statewide, and "hence not subject to gerrymandering," to be fatal to Republican voters' political gerrymandering claim, since a Republican governor could conceivably be elected at some point in the future, and that governor would have power to veto another Democratic-backed redistricting plan. *Id.*; *see also O'Lear*, 2002 WL 1052046, at *3 (interpreting *Bandemer* to require a showing that disfavored group would be shut out of the political process or that winning candidates would be "wholly indifferent" to plaintiffs' interests).

All of the cases construing *Bandemer* share the same three basic flaws. *First*, they misread the significance of *Bandemer*'s reference to minority vote-dilution cases. *See, e.g.*, *Badham*, 694 F. Supp. at 670 (citing *Bandemer*, 478 U.S. at 139). That reference was simply part of the plurality's response to Justice Powell's argument that a showing of discriminatory intent alone may be sufficient to make out a partisan gerrymandering claim. The plurality stated that, not only must a party allege that a redistricting "disadvantage[s] it at the polls," but

> a mere lack of proportionate results in one election cannot suffice in this regard. We have reached this conclusion in our cases involving challenges to individual multimember districts, and it applies equally here. In the individual multimember district cases, we have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation . . . . In those cases, the racial minorities asserting the successful

> equal protection claims had essentially been shut out of the political process. . . . In the statewide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only where a history (actual or projected) of disproportionate results appears in conjunction with similar indicia. The mere lack of control of the General Assembly after a single election does not rise to the requisite level.

Bandemer, 478 U.S. at 138-40 (plurality opinion) (citations and footnote omitted). This passage establishes that, to state a claim in a political gerrymandering case, as in a minority vote-dilution case, a claimant must show something more than discriminatory intent and disproportionate results in a single election. But it does not establish that the requisite "something more" in a political gerrymandering case is the same "something more" – that is, evidence of having been essentially "shut out of the political process" – required in a minority vote-dilution case.[6]

Second, to impose the same requirements on political gerrymandering cases and minority vote-dilution cases flies in the face of the *Bandemer* Court's express concern that legislatures not frustrate majority will by consigning political majorities – including major political parties – "to minority status." 478 U.S. at 126 n.9. Under any version of the "something more" requirement imposed in the post-

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[6] As noted above, *Bandemer* requires evidence that a map not only produces disproportionate election results, but also consistently frustrates the will of the political majority. To the extent that *Bandemer* may require a showing even beyond the frustration of majority will, this Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), may provide an appropriate additional factor. A districting map may be said to violate the Equal Protection Clause when, as here, it produces long-term disparate election results *and* it "subordinates" all traditional, neutral districting principles to partisan considerations. *See infra* Part II.

Bandemer cases, proof that a majority has been consigned to minority status is categorically insufficient. A plaintiff must also prove facts that have nothing to do with the challenged map and, in practice, almost never exist.

Given these bizarre readings of *Bandemer*, it is not surprising that courts have found a viable claim in just one case, *Republican Party v. Martin*, 980 F.2d 943 (4th Cir. 1992). In that case, Republican voters challenged a statewide system for electing trial judges that resulted in the election of just one Republican in 90 years. But as the *Martin* court itself recognized, it is not at all clear that even those extreme facts would meet the *Badham* standard. 980 F.2d at 958. The court noted that requiring members of a major political party to allege that they have been *silenced* would be to "hold, in effect, that regardless of the specific allegations of its complaint an identifiable political group could not survive a motion to dismiss or prevail on the merits of its claim." *Id.* (citation and internal quotation marks omitted). Such a construction, the court noted, "would render nugatory [*Bandemer*'s] holding that political groups may bring claims of partisan gerrymandering." *Id.*

Third, the factors discussed by *Badham* and the district court in this case were not those this Court actually employed in evaluating whether the *Bandemer* plaintiffs had stated a partisan gerrymandering claim. In considering plaintiffs' claim, this Court did not, for example, evaluate whether Democratic voters remained free to speak on issues of public concern, potentially could influence Republican legislators, or were able to elect some Democratic legislators. Instead, this Court rejected plaintiffs' claim because they had failed to establish that the disproportionate results of a single election (with 51.9% of the votes statewide, Democrats won 43% of seats in the House and 48% of seats in the Senate) were the predictable result of the

redistricting plan, or that they were a reliable predictor of future election results. *Bandemer*, 478 U.S. at 134-35 (plurality opinion). Thus, the Court based its decision on the extent and duration of the plan's likely effects on election results.

In short, in order to satisfy the "discriminatory effects" requirement of *Bandemer*, a plaintiff need only show (1) that "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively," and (2) that this will cause "continued frustration of the will of a majority of the voters." *Id.* at 133 (plurality opinion); *see also Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 656 (N.D. Ill. 1991) (three-judge court) ("plaintiff must establish a history (actual or projected) of disproportionate results" which results in continued frustration of majority will) (citation and internal quotation marks omitted). To be sure, this will occur relatively infrequently. This is possible only where a State is relatively evenly balanced politically, but one political party controls both the legislature and the governorship and is able to use that control to push through a redistricting plan designed to entrench a consistent and substantial advantage over the other party. But under *Bandemer*, a State violates the Equal Protection Clause when, as here, it consigns a political party to one-third or less of the congressional seats, even if that party consistently wins a majority of the vote statewide.

The allegations in this case thus suffice to make out a political gerrymandering claim under *Bandemer*: Act 1 will achieve its intended effect and produce extremely disproportionate results, and will result in the "continued frustration of the will of a majority of the voters" – precisely the type of discriminatory effects that the *Bandemer* Court identified as sufficient to state a political gerrymandering claim. 478 U.S. at 133, 139 (plurality opinion). As Chief

Justice Zappala put the matter, if this case does not involve a valid claim of political gerrymandering, then "no such claim exists." J.S. App. at 113a.

II. THIS COURT'S *SHAW V. RENO* LINE OF CASES SERVES TO CLARIFY ANALYSIS OF PARTISAN GERRYMANDERING CLAIMS.

The district court also erred in ignoring the additional direction on how to identify an unconstitutional gerrymander that this Court has provided since *Bandemer*. In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court clarified the boundary between constitutional uses of otherwise permissible districting considerations – such as race or party affiliation – and unconstitutional discrimination. In evaluating a claim of race-based redistricting, the *Shaw* Court held that a state legislature may not jettison neutral districting principles with the predominant purpose of advantaging or disadvantaging a particular group of voters. *Id.* at 642; *see also Miller v. Johnson*, 515 U.S. at 916-17. The Court determined that consideration of race – which is unquestionably a legitimate consideration in redistricting decisions under Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, 1973c – becomes illegitimate when it is employed to the exclusion of other "sound districting principles" such as "compactness, contiguity, and respect for political subdivisions." *Shaw*, 509 U.S. at 647. The Court's holding was based in part on its concern for the expressive harms that stem from governmental classification of voters on the basis of their race, and in part on its concern that,

> [w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as

> a whole. This is altogether antithetical to our system of representative democracy.

Id. at 648; *accord Miller*, 515 U.S. at 911-12.

The holdings in *Shaw* and *Miller* apply here as well. First, the problem the Court identified is, if anything, more acute in cases of political gerrymandering. When district lines are drawn solely to strengthen one party's grip on a district, the legislature sends an unmistakable message to the representative of that district that he or she need only respond to the concerns of that party's voters. Second, just as classifications based on race are of particular concern under the Equal Protection Clause, classifications based on partisan affiliation or political viewpoint are generally barred by the First and Fourteenth Amendments. *See Williams v. Rhodes*, 393 U.S. 23, 31 (1968); *see also Police Dep't v. Mosley*, 408 U.S. 92, 94-95 (1972). The State's burden of justifying laws that discriminate on the basis of political views is indeed a heavy one. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996); *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976). That burden should apply where a districting map is based entirely on the goal of maximizing the voting power of one party at the expense of another, while subordinating other traditional and neutral districting criteria.

Hunt v. Cromartie, 526 U.S. 541 (1999), and *Easley v. Cromartie*, 532 U.S. 234 (2001), which drew a distinction between race and politics as districting criteria, do not bar application of the *Shaw* approach to political gerrymandering cases. In those cases, this Court held that a district is not drawn predominantly on the basis of race in violation of *Shaw v. Reno* where the evidence is equally consistent with "a constitutional political objective" – there, the creation of a single safe Democratic seat. *Easley*, 532 U.S. at 238. The claim was that the legislature was seeking to divide

Democrats from Republicans in order to create both a Democratic-leaning seat and neighboring Republican-leaning seats. While these decisions affirm that political considerations are often permissible in districting, they do not stand for the proposition that a concerted effort to minimize the voting strength of a disfavored political party *statewide*, accompanied by a complete subordination of neutral districting criteria, is less of a constitutional concern than a comparable effort to separate voters based on race.

Act 1 is clearly unconstitutional under the principles announced in *Shaw*. Here, Republican legislators jettisoned every neutral, traditional districting principles in a single-minded effort to maximize their partisan advantage. *See* J.S. App. at 43a ("[I]t is clear that . . . neutral criteria were not high on the priority list in enacting Act 1."). The product of that effort is a districting plan that can rationally be viewed only as an effort to classify voters on the basis of their political-party affiliation, without regard to traditional, neutral districting principles. *See Shaw*, 509 U.S. at 644 (district "so bizarre on its face" as to be unexplainable on grounds other than race); *Miller*, 515 U.S. at 913 ("bizarre" shape relevant only to show "that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines").

This Court, having interpreted the Fourteenth Amendment as requiring strict scrutiny of irregularly shaped districts reflecting consideration of voters' race, should take the next step and recognize that equally irregular districts designed to dilute the votes based on political viewpoint are also constitutionally suspect. Appellants' allegations that the General Assembly abandoned *every* neutral redistricting criterion to draw district lines ensuring that Republicans will win two-thirds of Pennsylvania's districts, even if Democrats

receive a majority of votes statewide, should clearly suffice to establish an equal protection violation.

III. POLITICAL GERRYMANDERING IS INCONSISTENT WITH ARTICLE I LIMITATIONS ON STATES' AUTHORITY TO REGULATE FEDERAL ELECTIONS.

Finally, the district court erred in looking to the Equal Protection Clause as the only potential limit on political gerrymandering in congressional redistricting. Article I, Section 4 of the Constitution, which grants States their authority to regulate federal election procedures – including the drawing of congressional districts – imposes an even more fundamental limit on political gerrymandering. To date, this Court has not addressed the limits to a State's Article I, Section 4 authority in a political gerrymandering case; indeed, many of the post-*Bandemer* political gerrymandering cases, like *Bandemer* itself, have involved state-legislative redistricting, to which Article I does not apply. But in the context of a State's regulation of federal elections, recent decisions by this Court have made clear that Article I forbids States from using their Section 4 authority to thwart the will of the majority of the voters, as the Pennsylvania General Assembly has done in creating Act 1.

In Article I of the Constitution, the Framers vested the legislative power of the United States in two chambers: the Senate, which was intended to represent the States, and the House of Representatives, which was intended to represent the People, and whose members were accordingly to be chosen "by the People of the several States." U.S. Const. art. I, § 2. Under the Article I framework, the right to choose congressional representatives "belongs not to the States, but to the people." *U.S. Term Limits*, 514 U.S. at 821. This Court has held that the fundamental principle that the House of Representatives is to be chosen "by the People" forbids

States from valuing one person's vote in a congressional election more than another's, *see Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); from preventing congressional candidates who have served more than two terms from appearing on state ballots, *see U.S. Term Limits*, 514 U.S. at 832-35; and from noting on the ballots a congressional candidate's failure to support term limits, *see Cook v. Gralike*, 531 U.S. at 525-26. This principle also forbids States from distorting district lines to favor the party that momentarily controls the legislature, at the expense of the majority of the electorate.

Consistent with their vision of the House of Representatives as accountable to the people rather than to the States, the Framers limited the States' involvement in congressional elections to a tightly circumscribed power to set "[t]he Times, Places and Manner" of holding federal elections under the Elections Clause, U.S. Const. art. I, § 4, cl. 1. The Framers' limited delegation of authority to regulate the procedural decisions about the conduct of congressional elections reflects the Framers' "overriding concern" regarding "the potential for States' abuse of the power." *U.S. Term Limits*, 514 U.S. at 808-09. The Framers were particularly concerned that factional control of state legislatures might frustrate the will of the people in congressional elections. Discussing the Elections Clause at the Constitutional Convention, Madison noted:

> It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in the Natl. Legislature, as it was presumable that the Counties

> having the power in the former case would secure it to themselves in the latter.

2 *Records of the Federal Convention* 239. Madison's fear that a state legislature might abuse its authority to override majority rule was echoed throughout the ratifying conventions.[7]

The Elections Clause was thus drafted as a limited delegation of authority to the States, confined to procedural matters such as "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). As the Court made clear in *U.S. Term Limits*, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." 514 U.S. at 833-34; *accord Gralike*, 531 U.S. at 523.

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[7] In Massachusetts, one delegate worried that state legislatures,

> when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors.

2 *Elliot's Debates* 22-35 (Parsons). Another delegate noted that "a part [of Congress] should proceed directly from the people, and not from their substitutes, the legislatures; therefore the legislature ought not to control the elections," since "the [state] legislature may have a power to counteract the will of a majority of the people." 2 *id.* (Dana). In North Carolina, a delegate explained that the federal government should retain ultimate power over congressional elections in order "to secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only." 1 *Annals of Congress* 768-73 (Ames).

This Court has made clear that judicial review of state regulation of election procedure to determine whether it satisfies these principles is more searching in the context of congressional redistricting than is similar review of state-legislative redistricting under the Equal Protection Clause. For example, while the Equal Protection Clause requires adherence to the one-person, one-vote principle in the context of state-legislative redistricting, it affords more flexibility to States to deviate from absolute population equality in pursuit of legitimate state policies than does Article I, Section 2, which applies to congressional redistricting. Accordingly, while this Court has held that the Equal Protection Clause will tolerate population deviations at least as large as ten percent in the context of state redistricting, *see Brown v. Thomson*, 462 U.S. 835, 842 (1983), Article I will not tolerate even *de minimis* population deviations below one percent without adequate justification, *see Karcher*, 462 U.S. at 731-32.

Similarly, while the Constitution may tolerate somewhat larger departures from absolute neutrality in state-legislative redistricting, Article I strictly constrains the political faction that happens to control the state legislature at the right moment in the 10-year congressional redistricting cycle from dictating the composition of Pennsylvania's congressional delegation, at the expense of the right of "the people [to] choose whom they please to govern them." *U.S. Term Limits*, 514 U.S. at 793 (citation and internal quotation marks omitted). As Judge Niemeyer explained in a dissent that foreshadowed this Court's decisions in *U.S. Term Limits* and *Gralike*, "[t]here are fundamental differences between congressional districting under Art. I . . . [and] state legislative reapportionments." *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 402 (D. Md. 1991) (three-judge court) (Niemeyer, J., dissenting) (citation and internal

quotation marks omitted), *summarily aff'd*, 504 U.S. 938 (1992). Under Article I, "the state may not attempt to dictate the outcome of congressional elections" by drawing congressional districts that confer a substantial advantage on one political party. *Id.* at 402-03.

Act 1 exceeds those limits on a State's authority to regulate congressional elections. *First*, it is designed to "dictate electoral outcomes": under the plan, the outcome of electoral contests in Pennsylvania's 19 congressional districts is largely preordained, giving Pennsylvania voters little more than the power to ratify results already engineered by the state legislature's mapmakers. *See U.S. Term Limits*, 514 U.S. at 833-34; *accord Gralike*, 531 U.S. at 523. *Second*, Act 1 frustrates the majority's will by drawing districts that dispense with all neutral districting criteria to maximize Republican advantage in congressional elections.

Act 1 is thus much more than a mere procedural regulation. It disfavors Democratic candidates and voters and virtually guarantees a minority party's dominance for a decade. As such, it is an unconstitutional abuse of the Pennsylvania General Assembly's power under the Elections Clause.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY, Plaintiffs v. COMMONWEALTH OF PENNSYLVANIA, *et al.*, Defendants

CIVIL NO.1:CV-01-2439

February 22, 2002, Decided

February 22, 2002, Filed

OPINION OF THE COURT[1]

Before the court are: (1) a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) filed by Defendants Commonwealth of Pennsylvania, Pennsylvania Governor Mark Schweiker, Secretary of State Kim Pizzingrilli, and Commissioner of the Bureau of Commissions, Elections, and Legislation Richard Filling ("Executive Officers"); (2) Defendant Executive Officers' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6); (3) a Rule 12(b)(1) motion to dismiss filed by Defendants Matthew Ryan and Robert Jubelirer

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[1] RAMBO, SENIOR DISTRICT JUDGE authored the Opinion of the Court in which NYGAARD, CIRCUIT JUDGE and YOHN, DISTRICT JUDGE join.

("Presiding Officers")[2]; and (4) Defendant Presiding Officers' motion to dismiss pursuant to Rule 12(b)(6). The parties have briefed the issues, and the matter is ripe for disposition.

I. Background

A. Factual Allegations

Plaintiffs Richard Vieth, Norma Jean Vieth, and Susan Furey brought this action, pursuant to 42 U.S.C. § 1983, against Defendant Commonwealth of Pennsylvania, Defendant Executive Officers, and Defendant Presiding Officers. Plaintiffs' claims arise out of the enactment of Pennsylvania Senate Bill 1200 ("Act 1"), Pennsylvania's Congressional redistricting plan, which Governor Schweiker signed into law on January 7, 2002.

Plaintiffs allege the following facts in their complaint: On December 28, 2000, the United States Secretary of Commerce reported the results of the year 2000 decennial national census to then President William J. Clinton. The tabulation indicated that as of April 1, 2000 Pennsylvania had a resident population of 12,281,054 persons. Accordingly, the Secretary of Commerce's report allotted Pennsylvania only nineteen Congressional representatives resulting in a decrease of two representatives from the results of the 1990 census.

Thus, the responsibility for adopting a Congressional redistricting plan fell to Pennsylvania's General Assembly,

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[2] Defendant Ryan is the Speaker of the Pennsylvania House of Representatives, and Defendant Jubelirer is the Lieutenant Governor of the Commonwealth of Pennsylvania. Thus, Speaker Ryan presides over the Pennsylvania House of Representatives, and Lieutenant Governor Jubelirer presides over the Pennsylvania State Senate.

which failed to reach a compromise during the regular 2001 legislative session. The State House of Representatives passed one version, and the State Senate passed a different plan. The General Assembly, however, adjourned at an impasse on December 13, 2001.[3]

In the meantime, prominent national figures in the Republican party – such as congressional Speaker of the House Dennis Hastert, Congressman Thomas M. Davis III, United States Senator Rick Santorum, and Karl Rove, political consultant to current President George W. Bush – began pressuring Governor Schweiker, a Republican, and the Republican members of the General Assembly to adopt the Senate redistricting plan as a punitive measure against Democrats for having enacted apparently pro-Democrat redistricting plans in other states. In response, Republican members of the state House and Senate began working together to reach an agreement. In the process, they effectively ignored all Democratic members of the General Assembly, including members of the Conference Committee appointed to resolve the impasse between the competing plans.

At the Conference Committee meeting on January 2, 2002, the Republicans presented the final version ("Senate Bill 1200") of the new redistricting plan. The Democratic members of the Conference Committee had no input on this version. Although the bill passed the Conference Committee, thus sending it for a vote before both houses, all Democratic members of the Conference Committee voted against the version, and all Republicans voted in favor. On January 3, 2002, the General Assembly passed Senate Bill 1200. On

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[3] Plaintiffs also allege that the Republican party enjoys majorities in both state houses and holds the Governor's office.

January 7, 2002, Governor Schweiker signed the bill into law as Act 1.

Plaintiffs, registered Democrats and Pennsylvania citizens, subsequently filed this suit to enjoin Act 1's implementation. Plaintiffs Richard and Norma Jean Vieth both reside in Lebanon County, Pennsylvania, in a portion of the county that will fall in District 16 under Act 1. Plaintiff Susan Furey resides in Montgomery County, Pennsylvania. Under Act 1's precursor, Plaintiff Furey's residence fell in District 13. However, under Act 1, Plaintiff Furey now resides in District 6. Defendants are the Commonwealth of Pennsylvania and various executive and legislative officers who were either responsible for enacting Act 1 or will be responsible for implementing it during the next Congressional election.

According to the results of the 2000 census, Pennsylvania has a population of 12,281,054. When divided equally among the nineteen Congressional districts, this results in a population of 646,371 or 646,372 people per district.[4] However, under Act 1, District 7 would have a population of 646,380. On the other hand, Districts 1, 2, and 17 would each have a population of 646,361. Thus, under Act 1 there is a nineteen-person deviation between the least populated and most populated districts. While this is less than the deviation under the 1992 plan, unlike that plan, Act 1 splits eighty-four local governments (including twenty-five counties and fifty-nine cities, boroughs or townships) among different congressional districts. Montgomery County, where Plaintiff Furey resides, is divided up among six different congressional districts. Under the 1992 plan, only twenty-seven local governments (nineteen counties and eight cities,

[4] The actual result is 646,371.263157.

townships or boroughs) were split between different districts. Additionally, Districts 4, 6, 9, 10, 11, 13, 14, 15, and 19 have populations of over 646,372 without any legitimate justification.

Currently, the two major parties hold nearly equal support in the Commonwealth. Of voters registered with one of the two major parties, 53.6% are registered Democrats and 46.4% are registered Republicans. In November 2000, during the last election held under the 1992 plan, voters in Pennsylvania elected eleven Republican congressman and ten Democratic congressman to serve in Washington. In those twenty-one congressional races, Democrats garnered 50.6% of the aggregate vote, with Republicans receiving 49.4%. Democrats also received more total votes than Republicans, by a margin of 50.1% to 49.9%, in the five statewide races in 2000.[5] Yet despite this nearly equal split, Democrats will likely win only six of Pennsylvania's nineteen congressional seats. Thus, Act 1 is "designed to ensure that Republicans would win at least 13 of the 19 congressional seats." (Amd. Compl. at ¶ 32.) "It cements Republican power and effectively reduces Democrats to being a small minority of the Commonwealth's congressional delegation for the coming election and likely the coming decade." (*Id.* at ¶ 33.)

As a direct result, Act 1 "dramatically affects the Democratic Party's prospects for success in congressional elections in Pennsylvania ... and will reduce the choices that

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[5] In 2000, Pennsylvania held statewide elections for President, one United States Senate position, State Attorney General, State Auditor General, and State Treasurer. Democratic candidates won the elections for President and Auditor General, and Republican candidates won the elections for Attorney General, State Treasurer and United States Senator.

voters ... will have in Pennsylvania elections." (*Id.* at ¶ 35.) "Because of the bias ... the Democratic Party will have greater difficulty in fielding competitive candidates." (*Id.*) Thus, Act 1 operates "to essentially shut Democrats and Democratic voters out of the political process." (*Id.* at ¶ 36.) Plaintiffs, in particular, "will suffer harm ... [because they] will now be increasingly represented by members of Congress who do not represent their views." (*Id.* at ¶ 37.)

B. Procedural History

On December 21, 2001, Plaintiffs filed the original complaint in this matter. Subsequently, Plaintiffs filed a motion to convene a three-judge panel pursuant to 28 U.S.C. § 2284(b)(1). By an order dated January 23, 2002, the court granted Plaintiffs' motion and requested that Chief Judge Edward Becker of the Third Circuit Court of Appeals appoint the members of the panel. Chief Judge Becker appointed the current panel: The Honorable Richard Nygaard, United States Circuit Judge for the Third Circuit Court of Appeals; The Honorable William H. Yohn, Jr., United States District Judge for the Eastern District of Pennsylvania; and The Honorable Sylvia Rambo, Senior United States District Court Judge for the Middle District of Pennsylvania.

On January 11, 2002, Plaintiffs filed an amended complaint alleging violations of 42 U.S.C. § 1983[6]. In that

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[6] Plaintiffs include the violation of § 1983 under a separate count. However, "§ 1983 does not create substantive rights but 'merely redresses the deprivation of . . . rights . . . created by the Constitution or federal statute.'" *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 251-52 (3d. Cir. 1999) (quoting *W.B. v. Matula*, 67 F.3d 484, 493 (3d Cir. 1995)). Therefore, the court will construe Plaintiffs' amended complaint as an action brought pursuant to § 1983 to vindicate their rights under the Constitution.

document, Plaintiffs allege that Act 1 violates: (1) Article I, § 2 of the United States Constitution; (2) the Equal Protection Clause of the Fourteenth Amendment; (3) the Privileges and Immunities Clause of the Fourteenth Amendment; and (4) Plaintiffs' right to free association guaranteed by the First Amendment. Accordingly, Plaintiffs seek the following declaratory and injunctive relief: (1) a declaratory judgment that Act 1 violates Plaintiffs' constitutional rights; (2) a permanent injunction preventing Defendants from implementing Act 1; (3) a court order establishing a new congressional redistricting plan and enjoining Defendants from enacting or implementing a new plan until the 2004 elections; and (4) attorney's fees and court costs.

On January 22, 2002, Plaintiffs filed a motion requesting that the court set a deadline of February 18, 2002 for the state courts to conclude all litigation pertaining to Act 1.[7] Additionally, Plaintiffs filed an expedited motion for appointment of the three-judge panel. By an order dated January 24, 2002, the court denied Plaintiffs' motion to set a deadline and denied, as moot, Plaintiffs' expedited motion to convene a three-judge panel. By a separate order issued on January 24, 2002, the court set the case for an evidentiary hearing to be conducted on February 11 and February 12, 2002.

Also on January 24, 2002, both Defendant Presiding Officers and Executive Officers filed the separate motions to dismiss which are currently before the court. Defendant Presiding Officers followed this with a motion to abstain,

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[7] Currently, there is a state court action pending which attacks Act 1 on the basis that it violates the Pennsylvania Constitution. *See Efer v. Commonwealth of Pennsylvania*, 10 M.D. 2002 (Pa. Commw. Ct.).

filed on January 25, 2002. By separate orders, the court established an expedited briefing schedule for both the motions to dismiss and the motion for abstention.

Defendant Presiding Officers filed a motion for reconsideration and *vacatur* of the court's January 24, 2002 order that set the captioned matter for an evidentiary hearing starting February 11, 2002. The court held a telephone conference on January 29, 2002, which all parties attended, in order to discuss the reconsideration motion. During the conference call, counsel informed the court that the Supreme Court of Pennsylvania issued an order that afternoon requiring the Commonwealth Court to hold a hearing on Act 1 by February 1, 2002. Additionally, the Supreme Court of Pennsylvania ordered the Commonwealth Court to issue findings of fact and conclusions of law by February 8, 2002 addressing the validity of Act 1 under the Pennsylvania Constitution. In light of these circumstances, by an order dated January 30, 2002, the court delayed the evidentiary hearing until March 11, 2002 and set an expedited discovery schedule.

II. Discussion

A. Motion to Dismiss pursuant to Rule 12(b)(1)

1. Legal Standard

"A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court to address the merits of the plaintiff's complaint." *Ballenger v. Applied Digital Solutions, Inc.*, 2002 U.S. Dist. LEXIS 1518 at *8 (D. Del. January 31, 2002). The motion should be granted where the asserted claim is "in substantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Coxson v.*

Commonwealth of Pennsylvania, 935 F. Supp. 624, 626 (W.D. Pa. 1996) (citing *Growth Horizons v. Delaware County*, 983 F.2d 1277, 1280-81 (3d Cir. 1993)). Additionally, a motion to dismiss under Rule 12(b)(1) may present either a facial or factual challenge to subject matter jurisdiction. *See Mortensen v. First Federal Savings and Loan*, 549 F.2d 884, 891 (3d Cir. 1977).

This case presents a facial challenge because Defendants do not dispute, at this juncture, the existence of the jurisdictional facts alleged in the complaint. *See* 2 James Wm. Moore *et al.*, Moore's Federal Practice ¶ 12.30[4] (3d ed. 1999) (explaining the difference between a facial and factual challenge to subject matter jurisdiction pursuant to Rule 12(b)(1)). Therefore, the court must accept the facts alleged in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *Zinerman v. Burch*, 494 U.S. 113 (1990); *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990).

2. Partisan Gerrymandering Claim

In their motions to dismiss, Defendants contend that claims of partisan gerrymandering are non-justiciable. Thus, according to Defendants, the court lacks subject matter jurisdiction to hear such claims. However, Defendants also acknowledge that in *Davis v. Bandemer*, 478 U.S. 109 (1986), the Supreme Court held that such claims are justiciable as equal protection violations. Instead of arguing for dismissal, Defendants wish to have their objections to this holding noted on the record in case they seek to raise the issue at a later time. Accordingly, the court notes the objection.

3. Eleventh Amendment Immunity

Defendant Commonwealth of Pennsylvania seeks dismissal of the claims against it arguing that it is immune from suit in federal court based on Eleventh Amendment sovereign immunity. At a minimum, the Eleventh Amendment stands for two propositions: "first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (internal quotations omitted). Thus, the Eleventh Amendment "prohibits federal courts from entertaining suits by private parties against States and their agencies." *Alabama v. Pugh*, 438 U.S. 781, 791 (1978). This bar applies regardless of whether the plaintiff seeks monetary damages or injunctive relief against a State. *Seminole Tribe*, 517 U.S. at 58 (citing *Cory v. White*, 457 U.S. 85, 90 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought.")).

Under certain circumstances, the Eleventh Amendment does not bar federal courts from entertaining suits against States. First, suit is permitted where the State has waived its immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). Second, sovereign immunity does not apply if Congress validly abrogates it through its enforcement powers pursuant to the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 57-73. Third, Eleventh Amendment immunity is inapplicable where the plaintiff sues State officials in their official capacity seeking only prospective relief. *Ex Parte Young*, 209 U.S. 123 (1908).

In this case, Plaintiffs have brought suit against the Commonwealth thereby implicating its sovereign immunity.

Plaintiffs do not contend that the Commonwealth has waived its immunity, nor could they. Pennsylvania has clearly reserved its power to invoke sovereign immunity. 42 Pa. Cons. Stat. Ann. § 8521(b) (2001). Likewise, Plaintiffs could not contend that by enacting § 1983, Congress validly abrogated Pennsylvania's sovereign immunity. *See Quern v. Jordan*, 440 U.S. 332, 345 (1978) ("[Section] 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States."). *Ex Parte Young* is not implicated here. The Commonwealth is the only defendant to raise sovereign immunity as a defense.

Because the Eleventh Amendment bars suit against the Commonwealth of Pennsylvania under the circumstances present in this case, the court will dismiss the action against the Commonwealth for lack of subject matter jurisdiction.

4. Standing

The constitutional minimum of standing contains three elements:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted). The party who seeks the exercise of jurisdiction bears the burden of alleging facts that "he is a proper party to invoke judicial resolution of the dispute." *Warth v. Seldin*, 422 U.S. 490, 518 (1975); *see also McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

a. Partisan Gerrymandering

Defendants contend that Count II of Plaintiffs' amended complaint, alleging that Act 1 constitutes impermissible partisan gerrymandering in violation of the Equal Protection Clause, must be dismissed because Plaintiffs lack standing. The crux of Defendants' argument is that Plaintiffs do not have standing to challenge Act 1 as a whole.[8]

Defendants would have the court apply the standing requirement for racial gerrymandering cases to those involving only partisan gerrymandering. In the context of racial gerrymandering, in order to have standing a plaintiff must allege that he resides in a district that has been impermissibly gerrymandered on the basis of race. *United States v. Hays*, 515 U.S. 737, 743-44 (1995). Racial gerrymandering is prohibited because, where a district is created solely to serve the perceived common interests of one racial group, it is reasonable to presume that elected officials in such districts will ignore the plights of non-members of the dominant racial group. This stems from the

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[8] Defendants also argue that Plaintiffs have failed to establish standing because Plaintiffs "allege only group harm (i.e., to Democrat voters & the Democrat Party), not harm to their individual interests." (Def. Pres. Offs. Br. in Sup. Mot. to Dis. at 6.) However, Defendants overlook the fact that Plaintiffs allege harm to them as individual members of the Democratic party.

corollary that racial classifications are disfavored in general because they threaten to stigmatize individuals according to their race and incite racial hostility. *Id.* at 744 (citing *Shaw v. Reno*, 509 U.S. 630, 648 (1993)). Therefore, only where a person resides in a district created to cater to one race over another can he allege to have suffered the particularized harm necessary to justify standing. "On the other hand, where a plaintiff does not live in such a district, he ... does not suffer those special harms, and any inference that the plaintiff has personally been subject to a racial classification would not be justified absent evidence tending to support that inference." *Id.* at 745.

The reasoning underlying claims based on racial gerrymandering, however, is quite distinct from the type of injury that partisan gerrymandering inflicts. The very nature of a claim of partisan gerrymandering contemplates a harm which extends beyond that inflicted upon a particular voter. Rather, such a claim envisions harm to a particular class of voters that results in impermissibly denying them participation in the political process. The Supreme Court recognized this principal in *Davis v. Bandemer*, the first case holding that partisan gerrymandering may be actionable as a violation of equal protection. In that decision, the Court stated: "Although the statewide discrimination here was allegedly accomplished through the manipulation of individual district lines, the focus of the equal protection inquiry is necessarily somewhat different from that involved in the review of individual districts." 478 U.S. at 127.[9]

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[9] Moreover, we note that to the extent that an individual plaintiff is required to live in an allegedly gerrymandered district, Plaintiffs have met that requirement. Plaintiff Furey lives in District 6. (Amd. Compl. at ¶ 4.) Plaintiffs allege that District 6 is one of the gerrymandered districts. (Amd. Compl. at ¶ 22.)

In equal protection claims based on partisan gerrymandering, the allegation is that an identifiable political group has had its political voice silenced through the drawing of elective district lines. Although this involves, to a certain extent, manipulation of individual district lines, the injury is done to the entire identifiable political group. The constitutional injury lies not in inequality among various individual districts, but rather in the configuration of the districts as a whole when they serve to disadvantage a certain class of voters. Therefore, unlike a claim for race-based gerrymandering, a plaintiff in a partisan gerrymandering claim need not allege that he lives in a particular district that has been gerrymandered on the basis of political affiliation.

Additionally, we do not agree with Defendants that adopting such a standing rule would endow nationwide standing upon all individual members of the major political parties. In the context of partisan gerrymandering, to satisfy the particularized harm requirement, a plaintiff must allege that he or she is a member of a politically salient class whose geographical distribution is sufficiently ascertainable that it could have been taken into account when drawing district boundaries. In this case, Plaintiffs allege that they are citizens of Pennsylvania and members of the Democratic party. Additionally, they allege that Defendants have utilized the congressional redistricting process to vanquish Plaintiffs' political voice in Congress. These allegations, together, are sufficient to satisfy the particularized injury requirement for standing.

b. Remaining Claims

As to the remaining claims, Defendants intimate that Plaintiffs do not have standing because the injury that they allege is "speculative and generalized," (Def. Exec. Offs. Br. in Sup. Mot. to Dis. at 7,) and is "a purely hypothetical harm, tied to the allegation of partisan gerrymandering." (Def. Pres. Offs. Br. in Sup. Mot to Dis. at 7.) We disagree.

Defendants are correct that Plaintiffs do not allege that they have suffered an injury in fact as of this moment. However, Act 1 has yet to be implemented. Plaintiffs have clearly alleged that if Act 1 is allowed to be implemented it will cause a very real harm. Principally, Plaintiffs claim that their vote has been diluted in violation of the one person-one vote requirement of Article I. That harm is completely distinct from the harm that would be inflicted as a result of partisan gerrymandering. Act 1 has been enacted and, as of now, is scheduled to be used as the congressional district plan in the 2002 elections. If Act 1 is – as Plaintiffs have alleged – unconstitutional, then Plaintiffs have alleged a harm that is "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Therefore, the court has no problem concluding that Plaintiffs have alleged an injury in fact.[10] Likewise, Plaintiffs have sufficiently pleaded a causal connection between Defendants' conduct and the injury. Finally, as will be discussed below, *see infra* at Part II.B.7, the court has the remedial powers to redress the injuries that Plaintiffs have alleged. In short, the court

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[10] As to the one person-one vote claim, the court notes that no Plaintiff resides in an under-populated district. Additionally, Plaintiffs have alleged that there are districts that are under populated. Therefore, according to Plaintiffs' allegations, they have suffered an injury in fact due to vote dilution.

finds that the allegations of Counts I, III, and IV of Plaintiffs' amended complaint satisfy the constitutional minimum of standing.

B. Motion to Dismiss pursuant to Rule 12(b)(6)

1. Legal Standard

In deciding a motion to dismiss pursuant to Federal Rule 12(b)(6), the court is required to accept as true all of the factual allegations in the complaint and all reasonable inferences that can be drawn from the face of the complaint. *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996). "The complaint will be deemed to have alleged sufficient facts if it adequately put[s] the defendant[s] on notice of the essential elements of the plaintiff's cause of action." *Id.* The court will not dismiss a complaint for failure to state a claim "unless it appears beyond a doubt that the plaintiff[s] can prove no set of facts in support of [their] claim that would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

"In determining whether a claim should be dismissed under [Federal] Rule 12(b)(6), a court looks only to the facts alleged in the complaint and its attachments without reference to other parts of the record." *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). However, the court may consider "undisputedly authentic document[s] that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] document[s]." *Pension Ben. Guar. Corp. v. White Consol. Ind*, 998 F.2d 1192, 1196 (3d Cir. 1993).

2. Article I (One person-One vote)

In Count I of their amended complaint, Plaintiffs allege that Act 1 violates Article I, § 2 of the United States

Constitution[11] by diluting the vote of persons living in over-populated congressional districts. Defendants contend that this claim must be dismissed because Plaintiffs have failed to allege that: (1) a plan with smaller population deviations than Act 1 could have been enacted; or (2) that the deviations in Act 1 were unavoidable.

Article I, § 2, requires that members of Congress are chosen with equal representation for equal numbers of people. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1963). This Constitutional mandate, commonly referred to as the one person-one vote principle, requires "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* As the Supreme Court has explained:

> The "nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. ... Unless population variances among congressional districts are shown to have resulted, despite such effort, the State must justify each variance, *no matter how small*.... [Article I, § 2, therefore] permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."

Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969) (emphasis added).

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[11] In relevant part, Article I, § 2 states: "[Congressional] Representatives . . . shall be apportioned among the several States which may be included within this Union, according their respective Numbers . . . ."

Thus, in a challenge to a congressional redistricting plan, the plaintiff bears the initial burden of proving that the differences in district-to-district population could have been reduced or eliminated by "a good-faith effort to draw districts of equal population." *Karcher v. Daggett*, 462 U.S. 725, 730 (1983). If the plaintiffs can demonstrate that the differences in population were not the result of a good-faith effort to achieve equality in population between the various districts, then the State must prove that some legitimate reasons justifies the variances. *Id.* at 731.

Defendants argue that this claim should be dismissed because Plaintiffs have not offered a plan with smaller deviations, and Plaintiffs have not demonstrated that the deviations in Act 1 were unavoidable. According to Defendants, although there are variations in Act 1, they equal 0.00%. Therefore, "as a matter of law, the district populations are equal and there is no significant variance between districts to be explained." (Def. Pres. Offs. Br. in Sup. Mot. to Dis. at 8.) However, the Supreme Court has squarely rejected any *de minimis* exception to the requirement of absolute equality in population between districts. *Karcher*, 462 U.S. at 734 ("There are no *de minimis* variations, which could practically be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification.") "Article I, § 2, . . . permits only the limited population variations which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown." *Id.* at 730. Contrary to Defendants' contention, the only variations which are per se excusable are those which are unavoidable. For example, Pennsylvania's population of 12,281,054 does not divide equally between its allotted nineteen districts. Therefore, if all of the districts under Act 1 had populations of 646,371 or 646,372, then the court could conclude that the differences in

population were unavoidable and would not have to examine whether Act 1 was enacted in good faith.

However, according to Plaintiffs' allegations, this is simply not the case. District 7, the most populated district, has a population of 646,380, and Districts 1, 2, and 17, the least populated districts, have populations of 646,361; a maximum difference in population of nineteen. These variances, therefore, are not per se unavoidable. *See e.g. Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 395-96 (D. Md. 1991) (holding that a maximum deviation of ten between the most populated and the least populated districts does not satisfy Karcher's requirement of absolute equality). Plaintiffs also allege that Act 1's variances are not the result of a good-faith effort to achieve population parity, but rather are part of a Republican plan to eliminate Democratic representatives from Congress. Additionally, Plaintiffs make several factual allegations that, if proven, would tend to undermine any justification Defendants might proffer in support of Act 1's population variances.

Defendants cite *Karcher* for the proposition that Plaintiffs must allege that a plan with smaller deviations was possible. The court finds that argument unpersuasive. In *Karcher*, the plaintiffs provided the court with an alternative plan as evidence that the challenged plan was not the result of a good-faith effort to achieve district population parity. 462 U.S. at 739. That case, however, had proceeded beyond the Rule 12(b)(6) stage. While Plaintiffs may have to provide such a plan in order to satisfy their ultimate burden of persuasion in this case, there is nothing in the *Karcher* decision indicating that such a plan must be alleged in the complaint. Plaintiffs, therefore, have pleaded a prima facie violation of the one person-one vote command of Article I, §

2. Accordingly, the court will deny Defendants' motion to dismiss Count I of Plaintiffs' amended complaint.

3. Equal Protection (Partisan Gerrymandering)

In *Davis v. Bandemer*, the Supreme Court first recognized that claims for violation of equal protection based on partisan gerry mandering present justiciable issues. 478 U.S. at 123-26. Although that holding commanded a majority, only a plurality of the court endorsed the standards setting out what constitutes such a violation. Where a fragmented Court decides a case and no single rationale earns the endorsement of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976). Therefore, we may correctly view the plurality's analysis in *Bandemer* as constituting the governing standards to be applied in this case. *Accord Pope v. Blue*, 809 F. Supp. 392, 395 (W.D.N.C. 1992); *Republican Party v. Wilder*, 774 F. Supp. 400, 403-04 (W.D. Va. 1991); *Badham v. Fong Eu*, 694 F. Supp. 664, 668 (N.D. Cal. 1988).

In *Bandemer*, a plurality of the Court held that a plaintiff, in order to succeed on an equal protection claim of partisan gerrymandering, must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127. With this standard in mind, we now examine Plaintiffs' amended complaint in order to determine whether they have alleged facts that, if proven, would constitute an equal protection violation.

a. Identifiable Political Group

Defendants initially argue that Plaintiffs have failed to allege facts that could establish that they are members of an

identifiable political group. Specifically, Defendants contend that Plaintiffs have failed to allege facts demonstrating that Democrats in Pennsylvania vote as a block. However, Defendants do not point to any authority which would require such an allegation. The court has scoured the *Bandemer* decision and has found no such requirement. Instead, the court finds that *Bandemer* indicates that Plaintiffs must allege only that they are members of an identifiable political group whose geographical distribution is sufficiently ascertainable that it could have been used in drawing electoral district lines. Clearly, by alleging that they are Pennsylvanian citizens who vote for Democrats, Plaintiffs have satisfied this requirement.

b. Discriminatory Intent

Both parties appear to recognize that the intent requirement in this case has been met. As the *Bandemer* plurality pointed out, "as long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.* at 128. In this case, Plaintiffs allegations – that the Republican majority in the Pennsylvania General Assembly prevented all Democratic input on Act 1 in order to establish a Republican super-majority in Pennsylvania's congressional caucus – are sufficient to satisfy their pleading requirement.

c. Actual Discriminatory Effects

The analysis as to the actual discriminatory effect is not nearly as simple. It appears that the effects analysis itself involves another two-pronged determination. First, Plaintiffs must prove an actual or projected history of disproportionate election results. Second, Plaintiffs must prove that "the electoral system is arranged in a manner that will consistently degrade a voter's, or group of voters', influence

on the political process as a whole." *Id.* at 105. While Plaintiffs' allegations may be sufficient to satisfy the first requirement as a projection of disproportionate election results, they do not indicate that Plaintiffs have been, or will be, prevented from participating in the political process. Even assuming *arguendo* that Plaintiffs' allegations are true, the court will dismiss Plaintiffs' equal protection claim because Plaintiffs have not alleged facts indicating that as a result of Act 1 Plaintiffs will be completely shut out of the political process.

We begin our analysis by stating that the recondite standard enunciated in *Bandemer* offers little concrete guidance. However, the result may assist us. In that case, Republicans enjoyed majorities in both houses of the state legislature, and the Governor was a Republican. Exploiting these majorities, the Republicans adopted a state legislature redistricting plan that heavily favored Republicans. The plaintiffs in *Bandemer* filed suit challenging the plan as a violation of equal protection. At trial before a three-judge panel, the plaintiffs presented the following evidence: (1) of the statewide votes cast in the elections for the State House of Representatives, Democratic candidates received 51.9% of the vote, but won only forty-three of the 100 seats available; (2) of the statewide votes cast in the elections for the State Senate, Democratic candidates received 53.1% of the vote, but won only thirteen of the twenty-five seats available; (3) in two counties where 46.6% of the voting population tended to vote Democrat on a regular basis, Republicans won 85% of the seats available – eighteen out of twenty-one; (4) the plan disregarded political subdivision boundaries defining communities of interest; and (5) the plan disregarded the one person-one vote imperative and the Voting Rights Act's no retrogression requirement. 478 U.S.

at 116, 134. On this evidence, the panel held that the plan violated equal protection as a partisan gerrymandering.

A plurality of the Supreme Court, however, overturned that result. In doing so, the Court held that the evidence failed to establish that the redistricting plan had a sufficiently adverse impact on the Indiana Democrats to constitute a violation of the Equal Protection Clause. *Id.* at 129. Specifically, the Court stated that "the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Again, without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately underrepresented group." *Id.* at 105. According to the Court, the plaintiffs failed to provide any such evidence and, therefore, failed to establish an equal protection violation.

The three-judge panel in *Badham v. Fong Eu*,[12] applied the *Bandemer* standard and concluded that the plaintiffs there had not satisfied their burden of alleging that California's congressional redistricting plan resulted in Republicans being shut out of the political process as a whole. 694 F. Supp. at 670-71. In that case, an outgoing

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[12] Although the Supreme Court did not grant *certiorari* to hear the *Badham* case, it did summarily affirm the three-judge panel's decision. *See Badham v. Eu*, 488 U.S. 1024 (1989). Unlike a denial of *certiorari*, a summary affirmation by the Supreme Court creates precedential authority binding on the lower courts. *See* 12 Moore's Federal Practice ¶ 400.05-1 (3d ed. 1999). This authority extends only to the judgment's result, and not the underlying reasoning. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). "Nevertheless, due in particular to the fact that the *Bandemer* Court was unable to agree on a majority opinion, we believe that the *Badham* court's interpretation of *Bandemer*, subsequently affirmed by the Supreme Court, is entitled to substantial deference." *Pope v. Blue*, 809 F. Supp. at 395 n.2.

Democratic Governor colluded with the Democratic majority in the state legislature to pass a congressional redistricting plan that heavily favored Democratic candidates. In the first election held under that plan, Republicans received 50.1% of the vote statewide, but received only 40% of the congressional seats (eighteen of forty-five). The defendants filed a Rule 12(b)(6) motion to dismiss. The panel granted the motion holding that the plaintiffs had failed to allege facts that, if proven, would demonstrate an actual discriminatory effect on Californian Republicans. The *Badham* panel focused its analysis on the effects the plan would have on California's political landscape as a whole.

> It is on this second prong of the "effects" threshold that plaintiffs' complaint falters. Specifically, there are no factual allegations regarding California Republicans' role in the political process as a whole. . . . There are no allegations that California Republicans have been "shut out" of the political process, nor are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have been, any impediments to their full participation in the uninhibited, robust, and wide-open public debate on which our political system relies. . . .
>
> Particularly conspicuous by its absence is any allegation that plaintiffs' interests are being entirely ignored by their congressional representatives. ... Instead, plaintiffs claim that Democratic incumbents will be reelected without need to attend to the views of fragmented and submerged Republican minorities in their districts. . . Nowhere do plaintiffs suggest that they can prove

> disregard by any means other than by inference from the election results, a method which *Bandemer* removes from our purview.

Badham, 694 F. Supp. at 670-71 (internal quotations omitted).

In this case, Plaintiffs' allegations amount to this; Act 1 is rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans. As a result, Democrats will have a more difficult time electing their candidates. Due to this impediment, "the Democratic Party will have greater difficulty in fielding competitive candidates." (Amd. Compl. at ¶ 35.) Thus, Act 1 operates "to essentially shut Democrats and Democratic voters out of the political process." (*Id.* at ¶ 36.) Plaintiffs, in particular, "will suffer harm ... [because they] will now be increasingly represented by members of Congress who do not represent their views." (*Id.* at 37.)

As *Bandemer* and *Badham* dictate, these allegations are insufficient to make out a cause of action for violation of equal protection. First, Plaintiffs' allegation that Republicans will earn a super-majority of the congressional representatives despite their status as a minority party statewide is simply an argument for proportional representation. However, *Bandemer* soundly rejected such a basis for an equal protection violation. *See* 478 U.S. at 130 ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.")

Second, *Bandemer* was equally forceful in rejecting the presumption that voters who vote for losing candidates will not be adequately represented. *See id.* at 132 ("An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and has as much opportunity to influence that candidate as other voters in the district."). Therefore, Plaintiffs' allegation that they will be represented in Congress by Republicans who do not share their views bears no weight in our analysis.

Third, Plaintiffs' allegations that, due to Act 1, the Democratic party will have a greater difficulty in fielding competitive candidates is irrelevant. The focus in our inquiry is on the effect that the redistricting plan will have on an identifiable political group. In this case, as previously stated, that group is Pennsylvania Democratic *voters*. Therefore, the focus is on the effect Act 1 will have on the voters' ability to participate in the political process, not the Democratic party's health in Pennsylvania. The Constitution protects against partisan gerrymandering only because of the effect that it has on the individual's ability to exercise the fundamental right to vote. It goes without saying that political parties, although the principal players in the political process, do not have the right to vote. Therefore, their health is a non-issue in the constitutional analysis. Stripped to its bones, Plaintiffs' allegations, in this respect, amount to a claim that Act 1 will make it more difficult for them to elect Democratic candidates to Congress. However, this simply is not the end-all be-all constitutional analysis that Plaintiffs make it out to be.

> [T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice

> does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. . . . Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.

Id. at 131-32.

Finally, we find that Plaintiffs' allegations do not indicate that Act 1 "essentially shuts . . . Democratic voters out of the political process." (Amend. Compl. at ¶ 36.) While Plaintiffs employ this phrase in their complaint, these words do not have the talismanic effect of converting Act 1 into an actionable constitutional violation. *See Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (holding that when deciding a Rule 12(b)(6) motion to dismiss, the court must treat a plaintiff's allegations as true, but need not give such credence to legal conclusions). While Plaintiffs allege that Democratic members of the Pennsylvania General Assembly were shut out of the redistricting process, there are no allegations that anyone has ever prevented, or will ever prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern. *See Badham,* 694 F. Supp. at 670. Act 1 simply does not address such issues. In short, "Plaintiffs do not allege that there are, or ever have been, any impediments to their full participation in the 'uninhibited, robust, wide-open' public debate on which our political system relies." *Id.* (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

In summation, Plaintiffs have not alleged facts indicating that they have been shut out of the political process and, therefore, they cannot establish an actual discriminatory effect on them. Because the court holds that Plaintiffs' allegations are insufficient to pass the threshold effects analysis, the court will dismiss that portion of the complaint alleging that Act 1 violates the Equal Protection Clause.

4. Privileges and Immunities

In Count III of the amended complaint, Plaintiffs assert that Act 1 violates their rights pursuant to the Privileges and Immunities Clause of the Fourteenth Amendment.[13] However, the Third Circuit has recognized that "the Privileges and Immunities Clause of the Fourteenth Amendment has 'remained essentially moribund' since the Supreme Court's decision in *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872), and the Supreme Court has subsequently relied almost exclusively on the Due Process Clause as the source of unenumerated rights." *In re Sacred Heart Hosp.*, 133 F.3d 237, 244 (3d Cir. 1997).

Plaintiffs, though, argue that Act 1 "grants Republicans their right to be free of a district that does not impermissibly burden their rights to an undiluted vote, but it denies that right to Democrats." (Pls. Br. in Opp. Mot. to Dis. at 20.) Therefore, according to Plaintiffs, there must be some legitimate governmental purpose for Defendants' actions. In support for this contention, Plaintiffs rely entirely upon *Saenz v. Roe*, 526 U.S. 489 (1999). In *Saenz*, the Court held unconstitutional a California statute that limited the welfare

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[13] In relevant part, the Fourteenth Amendment reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. Const. amend. XIV, § 1.

benefits of new residents during their first year of residency in that state. The statute, the Court reasoned, violated the fundamental right of citizens to travel from state to state. In making this determination, the Court held that the statute violated the third element of the right to travel – the right of the newly-arrived citizen to enjoy the same privileges and immunities "enjoyed by other citizens of the same State." *Id.* at 502.

Plaintiffs, however, do not explain how the right to travel, which apparently is protected in some part by the Privileges and Immunities Clause, translates into a right to have proportional representation with Republican voters. Simply put, the Privileges and Immunities Clause, which protects against discrimination on the basis of state citizenship, has nothing to do with this case. In this case, there are no allegations that Plaintiffs are newly-arrived citizens of Pennsylvania or that they are citizens of other states. In fact, the amended complaint clearly states that both Plaintiffs and Defendants are citizens of Pennsylvania. (*See* Amd. Compl. at ¶¶ 2-5.) Because Plaintiffs have failed to allege a cause of action for violation of the Privileges and Immunities Clause, the court will dismiss Count III of the amended complaint.

5. First Amendment

In Count IV of the amended complaint, Plaintiffs assert that Act 1 violates their right to free association as guaranteed to them by the First Amendment. The gravamen of Plaintiffs' claim is that Act 1 constitutes a governmental classification based on political affiliation and, thus, violates their right to free association.

It is well established that the "First Amendment protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). However, Plaintiffs fail to

explain how Act 1 penalizes them for their exercise of First Amendment rights. Instead, Plaintiffs try to analogize their claim to a ballot access denial or a denial of the right to vote. However, nowhere in Plaintiffs' amended complaint do they allege that Act 1 prevents them from voting or having access to the ballot. Instead, Plaintiffs imply that Act 1 makes it more difficult for them to exercise these rights.

It is true that the First Amendment guarantees participation in the political process. However, as the legion of case law and common sense dictate, it does not guarantee that such participation will be successful. *Accord Republican Party v Martin*, 980 F.2d 943, 960 (4th Cir. 1992); *Pope v. Blue*, 809 F. Supp. at 398; *Badham*, 694 F. Supp. at 675. "Because there is 'no device that directly inhibits participation in the political process,' [Plaintiffs'] freedom of association claim boils down to the argument that they are entitled to political success." *Pope*, 809 at 398. This is a right which the Constitution does not guarantee. Therefore, we hold that the Plaintiffs' freedom of association claim is coextensive with their equal protection claim. *Accord Id.* As discussed above, *see supra*. Part II.B.3, Plaintiffs have not stated a claim for a recognized violation of the Fourteenth Amendment. Therefore, the court will dismiss Plaintiffs' claim in Count IV for failure to state a claim for violation of their First Amendment right to free association.

6. **42 U.S.C. § 1983**

In Count V, Plaintiffs assert a claim based on violation of 42 U.S.C. § 1983. However, as previously stated, *see supra*. at 6, n.6, "§ 1983 does not create substantive rights but 'merely redresses the deprivation of ... rights. . . created by the Constitution or federal statute.' " *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 178 F.3d 238, 251-52 (3d. Cir. 1999) (quoting *W.B. v. Matula*, 67 F.3d 484, 493 (3d Cir. 1995)).

Accordingly, the court has construed Plaintiffs' amended complaint as an action brought pursuant to § 1983 to vindicate their rights under the Constitution. Therefore, to the extent that Plaintiffs seek an independent basis for recovery, Count V will be dismissed.

7. Relief Sought

Finally, Defendants contend that the remainder of Plaintiffs' complaint must be dismissed because the court cannot grant the type of relief which Plaintiffs request. Specifically, Defendants rely upon *Growe v. Emison*, 507 U.S. 25, 34 (1993), for the proposition that the court is without power to create a new redistricting plan. That is, even if the court determines that Act 1 is unconstitutional, we must defer to the State legislature or judicial system to create a new plan. However, the court need not address that issue at this time. Plaintiffs request that the court grant a declaratory judgment that Act 1 violates the one person-one vote requirement of Article I. Clearly, the court has the remedial power to issue such a declaratory judgment.

III. Conclusion

As to Defendant Executive Officers' motion to dismiss for lack of subject matter jurisdiction, the court will grant that motion in part and will deny it in part. The court will grant the motion as to Defendant Commonwealth of Pennsylvania, which will be dismissed from the suit on the basis of Eleventh Amendment sovereign immunity. The court, however, will deny the motion in all other respects. Because the court finds that Plaintiffs have standing to sue, the court will deny Defendant Presiding Officers' motion to dismiss for lack of subject matter jurisdiction. Additionally, as to the motions to dismiss for failure to state a claim, the court will grant both motions in part and deny both motions

in part. The court holds that Plaintiffs have alleged a valid cause of action for violation of the one person-one vote requirement of Article I. Accordingly, the motions will be denied as to Count I of the amended complaint. However, the court will grant the motion as to Counts II, III, IV and V. An appropriate order will issue.

Dated: February 22, 2002.

ORDER

In accordance with the accompanying memorandum of law, **IT IS HEREBY ORDERED THAT**:

(1) Defendant Executive Officers' motion to dismiss pursuant to Rule 12(b)(1) is **GRANTED IN PART** and **DENIED IN PART**, as follows:

(A) As to Defendant Commonwealth of Pennsylvania, the motion is **GRANTED**, all claims against the Commonwealth are dismissed;

(B) In all other respects, the motion is **DENIED**;

(2) Defendant Presiding Officers' motion to dismiss pursuant to Rule 12(b)(1) is **DENIED**;

(3) Defendant Executive Officers' motion to dismiss pursuant to Rule 12(b)(6) is **GRANTED IN PART** and **DENIED IN PART**, as follows:

(A) The motion is **GRANTED** as to Counts II, III, IV and V of the amended complaint;

(B) The motion is **DENIED** as to Count I of the amended complaint;

(4) Defendant Presiding Officers' motion to dismiss pursuant to Rule 12(b)(6) is **GRANTED IN PART** and **DENIED IN PART**, as follows:

(A) The motion is **GRANTED** as to Counts II, III, IV and V of the amended complaint;

(B) The motion is **DENIED** as to Count I of the amended complaint.

/s/ Richard L. Nygaard

United States Circuit Judge

/s/ William H. Yohn, Jr.

United States District Judge

/s/ Sylvia H. Rambo

United States District Judge

Dated: February 22, 2002

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY, Plaintiffs v. COMMONWEALTH OF PENNSYLVANIA, *et al.*, Defendants

CIVIL NO. 1:CV-01-2439

April 8, 2002, Decided

April 8, 2002, Filed

OPINION AND ORDER OF THE COURT

PER CURIAM

In our previous order of February 22, 2002, we dismissed several claims brought by the Plaintiffs which challenged the constitutionality of Pennsylvania Senate Bill 1200 (Act 1), the congressional redistricting plan enacted by the General Assembly and signed into law on January 7, 2002. On March 11-12, 2002, we held a hearing on the Plaintiff's sole remaining claim: Act 1 violates the constitutional principle of "one-person, one vote." Upon conclusion of this hearing, we ordered the parties to file proposed findings of fact and conclusions of law.

I. Background

The 2000 Census reported that Pennsylvania's total population was 12,291,054 persons. As a result of this population figure, and in accordance with Article I, Section 2

and the Fourteenth Amendment to the United States Constitution, Pennsylvania's congressional delegation was reduced from twenty-one to nineteen representatives in Congress.[1]

The loss of two congressional seats made it necessary to increase the size of the existing districts by approximately 100,000 persons. Additionally, because of shifts in population, some congressional districts were over-populated while some were well under the ideal population. Therefore, significant changes were made to the existing congressional districts.

Pennsylvania Senate Bill 1200 was introduced by Senators Brightbill and Lemmond on November 16, 2001. Senators Brightbill and Lemmond are members of the Republican Party. A competing plan, Senate Bill 1241 was introduced by Democratic state senators Mellow, O'Pake, Wagner, Musto, Kasunic, Fumo and Stout. On December 10, 2001, the Senate considered amendments to Senate Bill 1200. A Republican amendment was ultimately agreed to. The version of Senate Bill 1200 that eventually passed the Senate contained a population deviation of twenty-four persons.

After an amendment by the Pennsylvania House of Representatives, that chamber passed Senate Bill 1200 on

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[1] Article I, Section 2 states in pertinent part: "The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors of each State shall have Qualification requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art I, § 2. Section 2 of the Fourteenth Amendment states in pertinent part: "Representatives shall be apportioned among the several states according to their representative numbers, counting the whole number of persons in each state." U.S. Const. amend. XIV, § 2.

December 12, 2001. The version of Senate Bill 1200 that passed the House had a total population deviation of nineteen persons.[2] It also maintained two minority-majority districts in the Philadelphia area, created one open seat in the southeastern part of the Commonwealth and paired two Democratic incumbents in the same district. One Democratic incumbent was paired against one Republican incumbent.

The Senate refused to concur in the amendments to Senate Bill 1200 offered by the House of Representatives. A Conference Committee was appointed and a plan was eventually devised that contained a nineteen person deviation. This Conference Committee Report on Senate Bill 1200 was passed by the Senate on January 3, 2002 and by the House of Representatives later the same day. It was signed into law on January 7, 2002.

In its final form, Act 1 created nineteen congressional districts with a total population deviation of nineteen. Although Act 1 did maintain two "minority-majority" districts in Philadelphia, it created three districts in which six incumbent congressman would have to run for re-election against each other. Of these pairings, two of the districts required Democratic congressmen to run against each other and one district required an incumbent Democratic representative to run against an incumbent Republican representative. These pairings of incumbent congressman permitted the creation of an open congressional district in the southeastern part of the Commonwealth. In contrast to its treatment of Democratic incumbents, no Republican congressmen are forced to run against each other.

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[2] The term "deviation" as used in this opinion refers to the differences in population between the least and most populated districts under the redistricting plan.

Moreover, Act 1 splits eighty-four local governments, including twenty-five counties, fifty-nine cities, boroughs or townships, as well as forty-one wards. It also splits six voting precincts.

II. Analysis

A. Population Deviation

The United States Constitution requires that each congressional district in a state contain equal population. *See Wesberry v. Sanders*, 376 U.S. 1, 18 (1864) (holding that Art. I, § 2 of the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."). The Supreme Court has been exceedingly clear in requiring lower courts to balance population among the districts with precision. *See Karcher v. Daggett*, 462 U.S. 725, 734 (1983) ("there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification.'); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("The 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."). In a challenge to a congressional redistricting plan, the plaintiff bears the burden of proving that the differences in district-to-district population could have been reduced or eliminated altogether by a "good-faith effort to draw districts of equal population." *Karcher*, 462 U.S. at 730.

We find that the Plaintiffs have met their burden in this case. First, it is undisputed that Act 1 has a deviation in population of nineteen persons between the most populated and least populated districts. Therefore, unless these

deviations were unavoidable or resulted despite a good faith effort to draw districts of equal population, then the Defendants must prove a legitimate justification for the deviations. The evidence conclusively demonstrates that this population deviation was avoidable. Plaintiffs presented into evidence "Alternative Plan 4" which had a minimum possible deviation - districts that differ by only one person. Additionally, this plan achieves zero deviation without splitting any precincts among congressional districts and splits fewer municipalities than Act 1. Witnesses presented by both parties testified that it would have been relatively easy to take any plan or map and reach a point of zero population deviation.[3] Indeed, the Defendants themselves

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[3] The Defendants suggest that "Alternative Plan 4" cannot be considered because it was never before the legislature. They argue that Plaintiffs must meet their burden under the first prong of the *Karcher* test only by relying on maps and/or redistricting plans that have a lower population deviation than the one enacted and that were presented to the legislature. We disagree. Although in *Karcher*, the legislature had before it other plans with less deviation, the Court never endorsed such a requirement. Instead, the Court focused on whether a plan with less deviation was possible. In this case, the Plaintiffs have provided four plans that had less deviations than Act 1. If we were to adopt the limited analysis suggested by the Defendants, we would be adopting a view that would isolate grossly disproportionate plans from constitutional scrutiny on the sole basis that such plans constitute the plan with the least deviations *available*. *Karcher* is wrought with references indicating that the least deviation *possible* is that which should govern the analysis. *See* 462 U.S. at 727 (affirming the three-judge panel's conclusion that the New Jersey plan violated the one-person, one-vote requirement "because the population deviations among districts, although small, were not the result of good-faith effort to achieve *population equality*) (emphasis added); 462 U.S. at 732-33 (stating that the Court requires that "*absolute population equality* be the paramount objective of apportionment . . . in the case of congressional districts," but not necessarily for other forms of redistricting) (emphasis added); 462 U.S. at 730 (stating that under the first prong of the analysis "the court must consider whether the

submitted a map with zero population deviation. Thus, the nineteen person deviation in Act 1 was avoidable.

Nor can the deviation contained in Act 1 be excused based upon the good faith of the Defendants. Indeed, we find that the testimony of defense witness Dr. John Memmi satisfies the Plaintiff's burden here. Dr. Memmi testified that he was in charge of drawing up the map that became Act 1. He further stated that he drew the map under the direct supervision of the Republican leadership. He began manipulating the map in order to get the deviations lower. However, once he reached the point of a nineteen-person deviation, he was told to stop manipulating the map:

> Q: Actually, what I would like to know is if there was a number that anybody said you could stop once you got to number nineteen or number 18?
>
> A: Every move that was made was done under the supervision of my supervisors. And at the time, the team involved the House Republican Caucus Redistricting crew, some members thereof, the Senate Republican Caucus Redistricting team, members thereof. And the Supervisors sat there while Bill Shower and I – Bill is a gentleman with the House Republican Caucus. They observed every census block move that we made. And

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population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of *equal population*") (emphasis added); 462 U.S. at 731 ("Adopting any standard other than *population equality*, using the best census data available . . . would subtly erode the Constitution's ideal of *equal representation*.") (emphasis added). In this case, the evidence indicates that a zero-deviation map was possible, and thus should govern our analysis under *Karcher's* first prong.

> we continued to make moves, and were monitoring the overall range. I should say we all monitored it, of course, but the supervisor's the one whose monitoring counted. And when the districts were at nineteen overall range, they said that is sufficient.

Tr. Vol 3 at page 276. No other witnesses were called by the Defendants to explain why Dr. Memmi was told to stop manipulating the map.

We find this testimony to be in clear violation of the Supreme Court's express goal of getting as close as possible to zero deviation when drawing congressional districts. *See Karcher*, 462 U.S. at 734. Therefore, we find that the Defendants did not put forth a good-faith effort to draw districts of equal population.

It has been suggested that the deviation from absolute numerical equality present in Act 1 is too trivial or minute to rise to a constitutionally significant level. While it is true that the deviation contained in Act 1 is small, *Karcher* specifically holds that "there are no *de minimis* variations which could practically be avoided, but nonetheless meet the standard of Art. I, § 2 without justification." 462 U.S. at 734. Thus, we hold that the population deviation in Act 1, even though relatively small, enables the Plaintiffs to satisfy *Karcher's* first prong and shifts to the Defendants the burden of proving justification.

B. Justification

Because the Plaintiffs have met their burden under *Karcher*, the Defendants must now prove that this population deviation was "necessary to achieve some legitimate goal." 462 U.S. at 731 (*citing Kirkpatrick*, 394 U.S. at 530; *Swann v. Adams*, 385 U.S. 440, 443-444 (1967)). While *Karcher* did not specify how the State might meet its burden in step two,

it did give several examples of legislative policies that might justify some variance among the populations of the State's various congressional districts. Specifically, the Court stated that "making districts compact, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between incumbent Representatives" may legitimate minor population deviations among congressional districts. The Court also made clear that the burden borne by the State varies inversely with the magnitude of the population deviation. 462 U.S. at 741. That is, the greater the deviation, the more compelling the government's justification must be.

Defendants contend that the population variances in Act 1 are justified by a desire to avoid splitting voting precincts.[4] Both parties agree that splitting precincts creates additional costs and work for county election officials in acquiring voting machines, in customizing ballots, in training precincts officials, in registering voters and in counting ballots. Moreover, we recognize that split precincts increase the potential for voter disorientation and candidate confusion. Therefore, to the extent that such justification is genuine, we acknowledge that the desire to avoid splitting precincts is a legitimate state interest which could justify a nineteen person deviation.

We find, however, that the Defendants' arguments on this point are a mere pretext. Specifically, the evidence has demonstrated that it is possible to draw a congressional district map with zero deviation and no precinct splits.

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[4] While the Defendants have suggested various other state interests which may have justified Act 1, since the focus of our inquiry in the justification phase is population deviation, the only justification submitted which deals with that issue is the policy objective of limiting voter precinct splits. Therefore, we will confine our analysis to this issue.

Plaintiffs' witness, Robert Priest, drew exactly such a map using the same tools as Dr. Memmi. However, unlike Dr. Memmi, Mr. Priest was free to draw the map by manipulating entire precincts from district-to-district in order to achieve absolute population equality. As we have previously pointed out, Dr. Memmi testified that he was more constrained by his superiors. According to that testimony, Dr. Memmi initially formulated three congressional districts of ideal population by manipulating entire precincts. However, at that point, he was instructed to stop using whole precincts and to begin using census blocks to lower the deviation. Because every voting precinct contains several census blocks, manipulation of the census blocks leads almost inextricably to splitting precincts. We also note that none of the congressional districts that have split precincts have an ideal population.

Dr. Memmi was equally restrained in his efforts to bring Act 1 down to a zero deviation. That is, his superiors in the Republican caucus instructed him that he was only to manipulate census blocks and not precincts. This wholesale reliance on the census block method – the lone cause of the precinct splits – is what Defendants now employ to justify the deviations in their map. The logical inconsistency is so deep that it causes us to pause and consider the sincerity of such proffer. If Defendants truly wanted to avoid splitting precincts, they would have done so by enacting a zero deviation map that did not split *any* precincts.

Moreover, it is worth noting that of the maps presented at trial, Act 1 is that which least comports with the neutral legislative policies that the *Karcher* Court stated would justify a Congressional redistricting plan with some deviations. Act 1 is the plan which contains the least compact districts. (Pls. Ex. 12 at 7.) Act 1 splits the most

counties (twenty-five) and municipalities (fifty-nine cities, townships, or boroughs).[5] (*Id.*) With the exception of Act 1's twin, the zero-deviation version, Act 1 even splits the most precincts. (*Id.*) To the extent that Act 1 retains the cores of prior districts, it does so only for districts containing Republican incumbents. (*See id.* at 8.)

However, it is on Karcher's final endorsed neutral criteria – the avoidance of contests between incumbents – that Act 1 fails most miserably. Although Pennsylvania's loss of two congressional seats requires the pairing of only two sets of incumbents in the 2002 elections, Act 1 pits six incumbents against each other: two pairs of Democrats, and one Republican against one Democrat (the latter in a district that heavily favors Republican candidates). At the same time Act 1 pits more incumbents than necessary against one another, it also creates a new district, District 6, in which no incumbent resides. In the face of such evidence, it is clear that Karcher's neutral criteria were not high on the priority list in enacting Act 1.

The dissent suggests that our analysis should pay deference to the policies that Act 1 reflects. However, there is no legal authority to support the corollary assertion that the only relevant zero-deviation maps with no precinct splits are those which comport with the general contours of Act 1.

In summation, it has been conclusively proven that it is possible to draw a congressional district map with zero population deviation amongst districts without splitting any precincts. Therefore, Defendants cannot rely on a general desire to avoid splitting precincts as a legitimate justification

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[5] In comparison, the now defunct 1992 Plan, which contained twenty-one congressional districts, split only eighteen counties and thirteen municipalities.

for a map that splits six such precincts. Put another way, if it is possible to achieve a zero deviation map with no precinct splits by manipulating whole precincts, the actions of the Defendants in switching to census block data call into question the legitimacy of their proffered justifications. We find, therefore, that the Defendants have failed to provide any legitimate justification for the population deviations contained in Act 1. As such, we enjoin the implementation of Act 1.

III. Remedy

Having determined that Act 1 is unconstitutional, we now address the question of the appropriate remedy. The Supreme Court has cautioned that "reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *White v. Weiser*, 412 U.S. 783 (1973). We recognize that the Pennsylvania General Assembly has primary jurisdiction over congressional redistricting. Furthermore, no evidence was presented that would permit us to conclude that the General Assembly would be unable to enact a new constitutional redistricting plan in time for the 2002 elections. This is not a case where the respective legislative bodies are hopelessly deadlocked and the likelihood is that they will be able to enact a constitutionally sound plan.

Therefore, the Defendants are ordered to submit a constitutionally sound redistricting plan that has been enacted into law by the Commonwealth of Pennsylvania to this court within three weeks of the date of this opinion.

An appropriate order will follow.

ORDER

In accordance with the preceding opinion, **IT IS HEREBY ORDERED THAT**:

(1) Plaintiffs' request for declaratory judgment is **GRANTED**. Act 1 is hereby declared unconstitutional as a violation of Article I, § 2 of the United States Constitution;

(2) Plaintiffs' request for injunctive relief is **GRANTED IN PART** as follows:

(A) To the extent that Plaintiffs request that the court enjoin Act 1's implementation, Plaintiffs' request is **GRANTED**. Defendants are permanently enjoined from implementing Act 1;

(B) To the extent that Plaintiffs request that the court devise its own redistricting plan for use in the 2002 congressional elections, Plaintiffs' request is **deferred pending compliance by the Pennsylvania General Assembly with this order**; and instead,

(3) The Pennsylvania General Assembly shall, within three weeks of the date of this order, prepare, enact and submit for review and final approval by this Court, a congressional redistricting plan in conformity with this opinion.

This Court shall retain jurisdiction pending issuance of a final order in this matter.

IT IS SO ORDERED.

/s/ Richard L. Nygaard

United States Circuit Judge

/s/ Sylvia H. Rambo

United States District Judge

Dated: April 8, 2002.

YOHN, DISTRICT JUDGE, DISSENTING:

I agree with majority that the plaintiffs have met the first prong of the *Karcher* test and that the appropriate remedy, if Act 1 is unconstitutional, is to give the Commonwealth of Pennsylvania a reasonable period of time to enact a constitutionally sound redistricting plan.

I respectfully dissent, however, from Section II.B. of the majority opinion and conclude that defendants have met their burden, although just barely, to establish a justification for the nineteen person maximum deviation, and that Act 1 therefore passes constitutional muster.

In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court stated that the plaintiffs' "success in proving that the Feldman Plan was not the product of a good faith effort to achieve population equality means only that the burden shifted to the state to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." (emphasis added). 462 U.S. at 740. Thus, the focus of the second prong of the *Karcher* test is the state's justification for the population deviations in Act 1.[6]

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[6] The majority correctly points out that the Court has "made clear that the burden borne by the state varies inversely with the magnitude of the population deviation. . . . That is, the greater the deviation, the more compelling the government's justification must be." It would seem therefore that a nineteen person deviation in a congressional district of 646,371 or 646,372 would require a justification on the lowest end of the "justification" scale.

The defendants have pointed to a litany of state interests behind Act 1; however, since the focus of our inquiry in the justification phase of the *Karcher* analysis is the population deviation, the only justification submitted which deals with that issue is the policy objective of limiting voter precinct splits. Defendants contend that Act 1 could be "zeroed-out" by using Modification One but that this would entail splitting twenty-six voting precincts rather than the split of six voting precincts in Act 1.

Both parties agree that splitting precincts creates additional costs and work for county election officials in acquiring voting machines, in customizing ballots, in training precinct officials, in registering voters and in counting ballots. In addition, it increases the potential for voter confusion and candidate confusion. Thus, the desire to minimize the splitting of voting precincts is a legitimate justification, particularly when the overall population deviation is only nineteen.

The evidence with reference to this justification is, however, minimal. Dr. John Memmi testified that he was the cartographer who worked on the final draft of what became Act 1. When he reached the population deviation of nineteen he was told by his superiors that he could stop work. Inexplicably, neither party asked Dr. Memmi who told him this or called as a witness the person who told him to stop work in order to explore the basis for the decision. As a result, we are left to draw inferences from the evidence presented.

Defendants ask us to draw the inference that the effort to equalize population was halted because of a desire not to split any more voting precincts. There are 9,427 voting precincts in Pennsylvania but there are 322,424 census blocks. Act 1 as enacted contained six voting precinct splits.

(Defendants' exhibit 92). Subsequent to the enactment of Act 1 Dr. Memmi made further adjustments of census blocks in order to produce a plan with a zero population deviation. Using census blocks inevitably leads to more voter precinct splits and the resulting plan, designated as Modification One contains twenty-six voting precinct splits. (Defendants' exhibit 90).

This inference is also supported by the testimony of Dr. Memmi concerning the conversation when he was working on the last draft of what became Act 1 and told that he could stop work.

> Q Did they tell you why they thought that was sufficient?
>
> A They did not specifically say John, Bill, these are the reasons why we are stopping at 19. I don't mean to be curt.
>
> One of the prevailing themes throughout the exercise was to minimize the number of precinct incursions. We were at six. I worked with individuals who understand the election process. They understand the administration at the county level.
>
> I do not profess to have any more than at best a superficial understanding of that. But the concern was to minimize the number of precinct incursions so that election administration would be as smooth as it could be.

R. at 320 - 21.

Finally, I note that neither party has, even with the benefit of hindsight, submitted a plan following the general

contours of Act 1 which does not involve the splitting of more than six voting precincts. Thus, I find that the inference defendants suggest, that the justification for Act 1 is the reduced number of voting precinct splits, is reasonable.

Plaintiffs, on the other hand, ask us to infer that the Act 1 plan was not "zeroed out" because of partisan considerations. Plaintiffs produced a map that was "zeroed out" without splitting any voting precincts, Alternative Four. However, this plan does not follow the general contours of Act 1. The Court has oftentimes reminded us of the necessity not to override state goals, policies and preferences any more than is necessary. *See Abrams v. Johnson*, 521 U.S. 74, 101 (1997); *Upham v. Seamon*, 456 U.S. 37, 41 - 42 (1982); *White v. Weiser*, 412 U.S. 783, 795 (1973). There is no evidence to support a conclusion that Alternative Four encompasses the many other state goals, policies and preferences inherent in Act 1 which resulted in its enactment. In addition, plaintiffs have suggested no connection between the nineteen person deviation in Act 1 and the alleged partisanship of the plan. Indeed, any such suggestion is contradicted by Dr. Memmi's specific testimony that when he was trying to reduce the plan to the minimal population deviation possible on December 31, 2001, nobody expressed any concern that continuing to trade whole precincts might change the political characteristics of some of the districts and that during the entire procedure there was no commentary of a political nature. R. at 322. Moreover, to the extent that the plaintiffs are arguing partisan gerrymandering, the *Karcher* Court noted that "beyond requiring states to justify population deviations with explicit, precise reasons, which might be expected to have some inhibitory effect, *Kirkpatrick* does little to prevent what is known as gerrymandering. . . . *Kirkpatrick's* object, achieving population equality, is far less ambitious than what

would be required to address gerrymandering on a constitutional level." *Karcher*, 462 U.S. at 734 n.6. Thus, the inference which the plaintiffs ask us to draw is not supported by the evidence, by reason, or by law.

I conclude, therefore, that the nineteen person deviation was justified by the "legitimate state objective" of avoiding further splitting of voter precincts and that there has been no proof that the population deviation of nineteen persons bore any relationship to the alleged partisanship of Act 1. Thus, Act 1 is not unconstitutional.

/s/ William H. Yohn, Jr.

United States District Judge

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA

JOANN ERFER and JEFFREY B. ALBERT, Petitioners v. THE COMMONWEALTH OF PENNSYLVANIA; MARK S. SCHWEIKER, in his official capacity as Governor of Pennsylvania; KIM PIZZINGRILLI, in her official capacity as Secretary of the Commonwealth of Pennsylvania; RICHARD FILLING, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State; ROBERT C. JUBELIRER, in his official capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate; MATTHEW J. RYAN, in his official capacity as Speaker of the Pennsylvania House of Representatives, Respondents

14 MM 2002

Application for Relief Pursuant to Section 726 of the Judicial Code

Filed: March 15, 2002

OPINION

MR. JUSTICE CAPPY

This opinion is filed in support of the per curiam order of this court dated February 15, 2002. That order dismissed the state constitutional law claims raised in Joann Erfer and Jeffrey Albert's Petition for Review.

This matter concerns the General Assembly's plan redrawing federal congressional districts to comport with the results of the 2000 Census. *See* Act No. 2002-1 ("Act 1"). Joann Erfer and Jeffrey Albert ("Petitioners") filed a Petition for Review with the Commonwealth Court on January 10, 2002, raising federal and state constitutional law challenges to Act 1. In light of the fact that February 19, 2002 is the opening date and March 12, 2002 is the closing date for the circulation and filing of nomination petitions for the 2002 elections, Petitioners also requested that the Commonwealth Court expedite its consideration of this matter.

On January 22, 2002, the Commonwealth Court, however, scheduled to hear this matter on March 13, 2002, one day after the closing date for the circulation and filing of nomination petitions. On January 25, 2002, Petitioners filed an emergency Application with this court, requesting that we exercise plenary jurisdiction over this matter and set an expedited hearing schedule. Notably, they requested that only their Pennsylvania Constitutional law claims be resolved on an expedited basis. We granted plenary jurisdiction and remanded this matter with the directive that the Commonwealth Court's findings of fact and conclusions of law should be filed with this court by February 8, 2002.

The Honorable Dante Pellegrini of the Commonwealth Court promptly held hearings in this matter. While Petitioners raised several state constitutional law claims, they focused primarily on their claim that the legislature engaged in unconstitutional political gerrymandering in drawing up Act 1 in violation of the equal protection guarantee, § § Pa. Const. art. 1, 1 and 26, and the free and equal elections clause, Pa. Const. art. 1, § 5. Petitioners acknowledged that based on voter registration figures, Act 1 grants rough parity to the two dominant political parties. *See* Pellegrini's

Recommended Findings of Fact and Conclusions of Law, dated February 8, 2002, (hereinafter "Pellegrini Opinion") at 12-13 (discussing statistics related to voter registration in the nineteen districts).[1] Thus, based solely on voter registration, there was no evidence of political gerrymandering. Yet, Petitioners did not contend that the evidence of gerrymandering could be found based upon the registration of the voters. Rather, they claimed that based upon the statistics of how voters actually cast their ballots in the past, the complexion of the districts was such that a Republican candidate would win in 13 or 14 of the 19 districts.

Judge Pellegrini agreed with Petitioners that roughly two-thirds of the districts would probably be won by Republicans, and that the legislature took the information it gleaned from analyzing voting trends and deliberately drew the congressional districts so as to grant an advantage to the Republican party. *See* Pellegrini Opinion at 16 and 27. Yet, Judge Pellegrini opined that Petitioners could not prevail on their gerrymandering claim, and were thus not entitled to relief, because Petitioners did not constitute an "identifiable political salient class". Pellegrini Opinion at 27.[2] The parties were then directed to file briefs with this court.

As we exercised plenary jurisdiction over this matter, but did not relinquish our jurisdiction when we ordered

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[1] The Pellegrini Opinion is attached at Appendix A.

[2] Petitioners also apparently pursued a state constitutional "one person, one vote" claim before Judge Pellegrini. *See* Pellegrini Opinion at 25. They also raised state constitutional law claims asserting an abridgement of their rights to free speech and free assembly. See § § Pa.Const. art. 1, 7 and 20. Judge Pellegrini concluded that Petitioners were not entitled to relief on these claims. *See* Pellegrini Opinion at 25, 27-28. In their brief to this court, Petitioners fail to pursue these claims. Thus, they will not be considered by this court.

Judge Pellegrini to hold hearings and issue a report, our review of the Pellegrini Opinion is *de novo. Annenberg v. Commonwealth*, 562 Pa. 581, 757 A.2d 338, 343 (Pa. 2000). Yet, we note that "when addressing the findings of fact made by [Judge Pellegrini], although such findings are not binding on us, we will afford them due consideration, as the jurist who presided over the hearings was in the best position to determine the facts. " *Id.*

At the outset, we must address the claim raised by Lieutenant Governor/President Pro Tem of the Senate Jubelirer and Speaker Ryan (collectively, "the Presiding Officers") that Petitioners do not have standing to pursue this matter. The Presiding Officers raised this issue below via preliminary objections and Judge Pellegrini opted not to address it. Pellegrini Opinion at 20. They raise two major arguments in support of their position.

First, the Presiding Officers contend that Petitioners cannot attack the constitutionality of the reapportionment plan as a whole. Rather, the Presiding Officers claim that Petitioners have standing to attack the constitutionality of Act 1 only as it relates to their districts, and may not challenge Act 1 with regard to how it draws the lines for other districts in this Commonwealth. In support of this claim, they rely heavily on the U.S. Supreme Court's decision in *United States v. Hays*, 515 U.S. 737 (1995).

Regardless of whether the Presiding Officers have correctly divined the holding of *Hays* as it relates to a determination of standing in matters commenced in federal court, it does not control our resolution of the standing issue. The U.S. Supreme Court has unequivocally declared that "state courts are not bound to adhere to federal standing requirements . . . ." *ASARCO Inc. v. Kadish*, 109 S. Ct. 2037, 2045 (1989). The high Court recognized that in

resolving issues of standing, state courts are not constrained by the dictates of Article III of the United States Constitution. *Id.* Thus, *Hays* does not control the outcome of this issue.

This court has not squarely addressed whether a litigant challenging a plan reapportioning congressional districts may attack the entirety of the plan, or is relegated to complaining about merely the district in which he lives. This gap, however, may be filled by applying our general rule of standing to this matter. We have stated that a party has standing where that party is "aggrieved". *In re T.J.*, 559 Pa. 118, 739 A.2d 478, 481 (Pa. 1999). "For a party to be aggrieved, it must have: 1) a substantial interest in the subject matter of the litigation; 2) the party's interest must be direct; and, 3) the interest must be immediate and not a remote consequence of the action." *Id.* (citations and internal quotation marks omitted).

The Presiding Officers would have us declare that a litigant challenging a reapportionment plan can have a substantial, direct, and immediate interest in only that portion of the plan which drew the lines for his particular district. We believe such a narrow interpretation to be discordant with the reality of challenging a reapportionment scheme. In mounting such an attack, a litigant cannot logically confine his challenge to his particular district. A reapportionment plan acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the whole. An allegation that a litigant's district was improperly gerrymandered necessarily involves a critique of the plan beyond the borders of his district. Thus, we decline to find that a litigant challenging a reapportionment scheme must confine his attack to the drawing of the lines of his own district.

The Presiding Officers also make a brief argument that political gerrymandering claims may be raised only by the Pennsylvania State Democratic Committee ("Democratic Committee") and not by individual voters.

The Presiding Officers have unwittingly presented an argument that is the mirror-opposite of what we have recently declared to be the law of standing in reapportionment matters. Shortly after the Presiding Officers filed their brief in this matter, we declared that "any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing to challenge the reapportionment plan." *Albert v. 2001 Legislative Reapportionment Comm'n*, 2002 Pa. LEXIS 317, 2002 WL 241297, *3 (Pa. Feb. 15, 2002). This conclusion was compelled by the fact that it is "the right to vote and the right to have one's vote counted that is the subject matter of a reapportionment challenge . . . ." *Id.* Clearly, a political committee does not have the right, in and of itself, to vote. Thus, contrary to the Presiding Officers' contention, the Democratic Committee (or its leaders acting in their official capacities) are not the only entities that could have standing in this challenge; in fact, the Democratic Committee is specifically denied standing to assert such a challenge.[3] We therefore reject this argument.

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[3] The Presiding Officers also briefly assert that Petitioners are unable to pursue this matter as they never adduced any evidence that Petitioners even exist, and thus Petitioners are no more than straw litigants. This argument must be rejected. The record reveals that Petitioners appended signed verifications that the averments contained in their Petition for Review are true and correct; these averments contain allegations that they are registered Democrats residing within Pennsylvania. Thus, we cannot accept the Presiding Officers' argument that Petitioners lack standing as there is no evidence that they exist.

Furthermore, to the extent that these verifications would be deemed insufficient to establish Petitioners' existence, a remand to Judge Pellegrini to hold a hearing on this limited issue would be a waste of judicial resources as we have determined that Petitioners are not entitled to relief on the substance of their state constitutional law claims.

The Presiding Officers assert that even if Petitioners are the proper parties to bring this challenge, we should still dismiss the matter without examining the merits. They contend that none of the protections afforded by the Pennsylvania Constitution may be extended to congressional elections; rather, they claim that the only applicable constitutional provisions are contained in the U.S. Constitution. In support of this contention, they note that the United States Constitution has given the state legislatures the power to draw congressional reapportionment plans. *See* U.S. Const. art. I, § 4, cl. 1. Thus, they conclude, as the legislature's power to effect a congressional reapportionment derives from the U.S. Constitution, then the Pennsylvania Constitution is inapplicable to a congressional reapportionment plan. They argue that we should thus deny Petitioners relief without examining the substance of the state constitutional law claims.

It is true that the U.S. Constitution has granted our legislature the power to craft congressional reapportionment plans. Yet, we see no indication that such a grant of power simultaneously suspended the constitution of our Commonwealth vis-à-vis congressional reapportionment. Without clear support for the radical conclusion that our Commonwealth's Constitution is nullified in challenges to congressional reapportionment plans, it would be highly inappropriate for us to so circumscribe the operation of the

organic legal document of our Commonwealth. We therefore reject this argument.

The Presiding Officers also make a fleeting argument that the free and equal elections clause, Pa. Const. art. 1, § 5, applies only in elections for offices of the Commonwealth. As the position of representative to the United States Congress is not an office of the Commonwealth, they reason, then this provision has no application to congressional elections. We reject this argument as nothing in the plain language of the free and equal elections clause limits it to elections for Commonwealth officials.

Having determined for the purposes of our review that Petitioners have standing and that the Pennsylvania Constitution applies to congressional reapportionment plans, we may now turn to the substance of Petitioners' challenge. The crux of this dispute is whether Petitioners have established that Act 1 constitutes unconstitutional political gerrymandering in violation of the equal protection guarantee, Pa. Const. art. 1, §§ 1 and 26, and the free and equal elections clause, Pa. Const. art. 1, § 5. As with any legislative enactment, Act 1 enjoys a presumption of constitutionality. *Commonwealth v. Means*, 773 A.2d 143, 147 (Pa. 2001). A plaintiff bears a heavy burden to prove it unconstitutional. "A statute will only be declared unconstitutional if it clearly, palpably and plainly violates the constitution." Id. (citations omitted).

This court did not always recognize that a claim of political gerrymandering was cognizable under the Pennsylvania Constitution. *See Newbold v. Osser*, 425 Pa. 478, 230 A.2d 54 (Pa. 1967). This court changed tack, however, in our unanimous decision *In re 1991 Reapportionment*, 530 Pa. 335, 609 A.2d 132 (Pa. 1992), and recognized that a litigant could raise claims that a

reapportionment plan effected a political gerrymander and thus violated the U.S. and Pennsylvania Constitutions. This new view on the justiciability of political gerrymandering claims was predicated on the U.S. Supreme Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), wherein the Court held that such claims were cognizable as a violation of the Equal Protection Clause.

Once having determined that the claim was justiciable, the next task for the 1991 Reapportionment court was to define the contours of the test for determining whether unconstitutional political gerrymandering had occurred. Unfortunately, a majority of the *Bandemer* Court was unable to agree on the parameters of such a test. While the *Bandemer* Court issued no holding on this point, the 1991 Reapportionment court opted to follow the test set forth by the *Bandemer* plurality. The 1991 Reapportionment court then proceeded to utilize the test set forth by the *Bandemer* plurality to resolve both federal and state constitutional political gerrymandering claims.

In resolving Petitioners' claim that Act 1 is a political gerrymander in violation of the Pennsylvania Constitution, we will continue the precedent enunciated in 1991 Reapportionment and apply the test set forth by the *Bandemer* plurality. We reject Petitioners' arguments that we should declare that the right to vote guaranteed by our Commonwealth's Constitution provides broader protections than those guaranteed by the federal Equal Protection Clause. We come to this conclusion for two reasons. First, to the extent that Petitioners' gerrymandering claim is predicated on the equal protection guarantee contained in Pa. Const. art. 1, §§ 1 and 26, this court has previously determined that this right is coterminous with its federal counterpart. *Love v. Borough of Stroudsburg*, 528 Pa. 320,

597 A.2d 1137 (Pa. 1991). Second, we reject Petitioners' claim that the Pennsylvania Constitution's free and equal elections clause provides further protection to the right to vote than does the Equal Protection Clause. Petitioners provide us with no persuasive argument as to why we should, at this juncture, interpret our constitution in such a fashion that the right to vote is more expansive than the guarantee found in the federal constitution. *See generally Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (Pa. 1991).

While we continue to adhere to the view that the disposition of political gerrymandering claims should be controlled by the *Bandemer* plurality, we are also fully cognizant of the fact the plurality's opinion has bedeviled both commentators and courts, obscuring via its labrynthian twists and turns of logic the precise nature of the standard to be employed. *See, e.g.*, Michael E. Lewyn, *How to Limit Gerrymandering*, 45 Fl. Law Rev. 403, 443 (1993) (The *Bandemer* plurality has "confounded legislators, practitioners, and academics alike. Some find the case internally incoherent; others find a method to the madness." (internal quotation marks and citation omitted)). Yet, we find that by carefully parsing out the plurality's language, we can arrive at a simple (although decidedly not simplistic) recitation of the test. Distilled to its essence, the plurality's test states that a plaintiff raising a gerrymandering claim must establish that there was intentional discrimination against an identifiable political group and that there was an actual discriminatory effect on that group. *Bandemer*, 478 U.S. at 127. In establishing that there has been a discriminatory effect, the plaintiff must show two things: first, he must show that the identifiable group has been, or is projected to be, disadvantaged at the polls; second, he must establish that by being disadvantaged at the polls, the

identifiable group will "lack . . . political power and [be denied] fair representation." *Id.* at 139 (hereinafter referred to as the "effects test").

The first determination we must make is whether Petitioners have shown that the legislature in crafting Act 1 intentionally discriminated against an identifiable political group. The *Bandemer* plurality candidly recognized that in most instances, intentional discrimination would not be difficult to show since "as long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129. In the matter *sub judice*, Judge Pellegrini found that the legislature deliberately drew the congressional districts so as to grant an advantage to the Republican party and thus concluded that there was a discriminatory intent. *See* Pellegrini Opinion at 16 and 27. We see no basis to reject this conclusion.

Judge Pellegrini was not persuaded, however, that Petitioners had shown that citizens who vote Democratic (but are not necessarily registered Democrats) are an identifiable political group. He contended that Petitioners should be denied relief because they had failed to show that "voters who are likely to vote Democratic (or Republican) in a particular district though not registered Democrats (or Republicans) based on the candidates or issues" are an identifiable political group. Pellegrini Opinion at 27.

We cannot agree with such a sweeping conclusion. While we are uncertain whether Petitioners' evidence established that there is an identifiable political class of citizens who vote for Democratic congressional candidates, we also find it to be imprudent to state, as a blanket proposition, that future plaintiffs could never adduce sufficient evidence to establish that such an identifiable class exists. We surmise that,

particularly since the field of information technology is advancing at a breakneck speed, such a showing could be made by future challengers. However, it is not incumbent upon us to resolve this thorny issue as Petitioners' claim falters on another basis. Thus, in this matter, we will assume without deciding that Petitioners have shown the existence of an identifiable political group.

The finding that there was an intent to discriminate and the assumption that Petitioners have shown the existence of an identifiable political class allows Petitioners to clear only the first hurdle of the test set forth by the *Bandemer* plurality. In order to show that there has been unconstitutional political gerrymandering, Petitioners must also show that the reapportionment plan works "an actual discriminatory effect . . . ." *Bandemer*, 478 U.S. at 127. As noted supra, the plaintiff must prove two things in order to establish an actual discriminatory effect. First, he must show that the reapportionment plan works disproportionate results at the polls; this can be accomplished via actual election results or by projected outcomes of future elections. *Id.* at 139. Second, he must adduce evidence indicating a "strong indicia of lack of political power and the denial of fair representation." *Id.* To meet this second prong of the effects test, the discriminated against group must show that it has "essentially been shut out of the political process." Id. See also *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992); *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988) (discussing the two prongs of the Bandemer plurality's actual discriminatory effects test).

We emphasize that the effects test is conjunctive in nature, and that both showings of an actual discriminatory effect must be made. The plurality explicitly stated that "a group's electoral power is not unconstitutionally diminished

by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause." *Bandemer*, 478 U.S. at 132 (citations omitted). The *Bandemer* plurality supported this conclusion by reasoning that "an individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters." *Id.*

This is unquestionably an onerous standard, difficult for a plaintiff to meet. Yet it was not unwittingly crafted. The *Bandemer* plurality, aware that it was treading on ground that the judiciary had previously declared forbidden to itself, was chary about creating a test that would allow for officious interference with the state legislatures' prerogative to create reapportionment plans. While the *Bandemer* plurality gave notice to the state legislatures that they would no longer be free to construct political gerrymanders with impunity, it recognized that reapportionment is "the most political of legislative functions," one not amenable to judicial control or correction save for the most egregious abuses of that power. *Id.* at 143.[4]

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[4] In this court's recent decision regarding challenges to reapportionment of the Pennsylvania Legislature, three Justices expressed receptiveness to the concern that the Court should not occupy an unduly passive role in the vindication of express state constitutional requirements of compactness and integrity of political subdivisions. *See Albert v. 2001 Legislative Reapportionment Comm'n*, ___ A.2d ___, 2002 WL 241297 (Pa. Feb. 15, 2002) (Saylor, J., concurring). In the present context of Congressional reapportionment, however, there are no

In the matter *sub judice*, Petitioners adduced evidence showing that the number of congressional seats that Republicans are projected to win will be disproportionate to the percentage of the vote Republicans are anticipated to receive statewide. Even if we assume *arguendo* that this evidence establishes that Act 1 will effect disproportionate election results,[5] Petitioners are nonetheless not entitled to relief as they have not shown that there is a "strong indicia of lack of political power and the denial of fair representation." See *Bandemer,* 478 U.S. at 139. As stated *supra*, this prong of the effects test requires a plaintiff to establish that the discriminated against group has effectively been shut out of the political process. Petitioners have failed to meet this burden. First, they have not alleged in their brief to this court that a winning Republican congressional candidate "will entirely ignore the interests" of those citizens within his district who voted for the Democratic candidate. *See Bandemer,* 478 U.S. at 132. Also, it is undisputed that at least five of the districts are "safe seats" for Democratic candidates, thus further undermining Petitioners' claim that Democrats have been entirely shut out of the political process. *See Pope*, 809 F. Supp. at 397 (the party which was allegedly discriminated against had not been shut out of the

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analogous, direct textual references to such neutral apportionment criteria. Accordingly, the significance of these factors to the present equal protection and free and equal election challenges is limited by the degree to which their presence or absence would evidence intent or effects under Bandemer.

[5] The Presiding Officers raise a host of issues challenging the admissibility of the evidence adduced by Petitioners at the hearing before Judge Pellegrini. We need not resolve these issues as we find that Petitioners' evidence, even assuming that it is all admissible, is insufficient to entitle them to relief.

political process where it was virtually guaranteed to win some seats.)

Petitioners seem to believe that evidence of disproportionate results necessarily leads to a conclusion that there will also be a lack of political power and denial of fair representation, and that separate proof showing that the Democrats will be shut out of the political process is not necessary. In essence, Petitioners want us to collapse the two prongs of the effects test into one. This is precisely what the *Bandemer* plurality forbad, and we perceive no sound reason to ease Petitioners' burden in this respect.

Accordingly, we find that Petitioners have failed to carry their burden of establishing that Act 1 effectuates a political gerrymander in violation of the Pennsylvania Constitution, and thus deny relief on the state constitutional law claims raised in Petitioners' Petition for Review. As only the state law claims are before this court and those claims are dismissed, jurisdiction is relinquished.

Mr. Chief Justice Zappala files a dissenting opinion.

APPENDIX

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 10, 2002, JoAnn Erfer and Jeffrey Albert ("Petitioners") filed a Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief ("Petition") in the Commonwealth Court of Pennsylvania challenging Act No. 2002-I ("Act 1"). This statute puts into place 19 congressional districts in accordance with the results of the 2000 Census. Named as Respondents were the Commonwealth; the Governor of Pennsylvania Mark Schweiker; Secretary of the Commonwealth, Kim Pizzingrilli; Commissioner of the Bureau of Commissions,

Elections and Legislation of the Pennsylvania Department of State, Richard Filling (collectively, the "Commonwealth"); Lieutenant Governor Robert Jubelirer and Speaker of the House of Representatives Matthew Ryan ("Presiding Officers").

Petitioners allege that Act I violates certain constitutional rights under the United States Constitution. As to federal constitutional rights violated, it contends that Act 1 denies or abridges their "right to vote for their Representative to the United States Congress," in violation of U.S. CONST. art. I, § 2, and amendment XIV, § 2 and U.S. CONST. art. I, § 4 (Claim I); denies them "equal protection of the laws as guaranteed to them by the Equal Protection Clause" of amendment XIV, § 1 (Claim II); "constitutes an abridgment of the privileges and immunities of citizenship guaranteed to [them] by the Privilege or Immunities Clause" of amendment XIV, § 1 (Claim III); denies or abridges their "right to free association" as guaranteed to them by amendment I (Claim IV); and "constitute[s] a violation of" 42 U.S.C. § 1983 (Claim V).

Under the Pennsylvania Constitution, they contend that Act 1 denies or abridges their rights "as equally free and independent citizens" under PA. CONST. art. I, § 1 (Claim VI); denies or abridges their right "to a free and equal election" under PA. CONST. art. I, § 5 (Claim VII); discriminates against them in their "exercise of their civil rights" in violation of PA. CONST. art I., § 26 (Claim VIII); and violates their rights "to assemble together for their common good" and their right to freedom of speech in violation of PA. CONST. art. 1, §§ 7 & 20 (Claim IX).

On January 11, 2002, Petitioners asked Commonwealth Court to expedite consideration of the case and on January 16, 2002, Presiding Officers filed preliminary objections to

the Petition. Commonwealth Court ordered an expedited briefing schedule for the preliminary objections with arguments to be held before Commonwealth Court *en banc* on March 13, 2002.

On January 25, 2002, Petitioners applied to the Supreme Court of Pennsylvania, asking it to assume plenary jurisdiction of the state constitutional claims (Claims VI-IX) under 42 Pa. C.S. § 726 and to expedite consideration. The Supreme Court responded with the following order:

AND NOW, this 29th day of January, 2002, Petitioners' request that this court exercise plenary jurisdiction over this matter is GRANTED. The matter is REMANDED to the Commonwealth Court for expedited consideration. The Commonwealth Court is to limit its consideration of the matter to the state constitutional claim[s] raised by Petitioners in their Petition for Review that they filed with the Commonwealth Court on January 10, 2002 that is docketed at 10 M.D. 2002. The Commonwealth Court is directed to file its findings of fact and conclusions of law with this court no later than NOON on February 8, 2002.

Order dated 1/29/02 in Dkt. No. 14 MM 2002. By order the same day, a hearing was scheduled for Friday, February 1, 2002.

Also on January 29, 2002, Respondents filed an application to withdraw their preliminary objections, and simultaneously therewith, filed an Answer with New Matter to the Petition and a Third-Party Petition for Review in the Nature of a Complaint for Declaratory Relief, naming as third-party Respondents Richard & Norma Jean Veith and Susan Furey.

A hearing was held on February 1, 2002. Petitioners called six witnesses: Congressman Joseph Hoeffel, Professor David Lublin, Congressman Frank Mascara, Larry Sparr (Director of Elections for Washington County), Representative William DeWeese (Minority Leader of the House), and Larry Ceisler (a paid partisan consultant & media political pundit).

The following exhibits of Petitioners were admitted over objection. The maps titled by Petitioners as "Conference Committee Plan" are the final maps enacted by Act 1.

Exhibit 1 Map: U.S. Congressional Districts 1992-2001.
Exhibit 2 Map: U.S. Congressional Districts 1992-2201 - Greater Southeast.
Exhibit 6 Map: 2001 Congressional Reapportionment Conference Committee Plan.
Exhibit 7 Map: 2001 Conference Committee Plan - Southeast Pa.
Exhibit 9 Map: 12th & 18th Congressional District - Conference Committee.
Exhibit 11 Map: 2001 Conference Committee Plan, Philadelphia County.
Exhibit 39 Chart: Percentage of the Republican Vote Needed for GOP to Win Seats Based on Statewide Election Results.
Exhibit 40 Graph: Percent of Votes to Elect 14 Republicans (1992) or 13 Republicans (Proposed Plan).
Exhibit 42 Chart: Compactness.
Exhibit 43 Graph: Percent Constituents Retained by Plan and Party.
Exhibit 44 Chart: Percentage of Districts with Above Average Republican Strength.
Exhibit 45 Graph: Average Share of Districts with Above Average GOP Statewide Vote Strength Based on Major-Party Vote.

Exhibit 47 Chart: Treatment of Incumbents: 1st Alternative Plan.
Exhibit 48 Chart: Treatment of Incumbents: Conference Plan.
Exhibit 49 Chart: Treatment of Incumbents: 2nd Alternative Plan.
Exhibit 50 Graph: Estimated Percent Republican Seats.
Exhibit 51 Chart: Partisan Characteristics of Districts: 1st Alternative Plan.
Exhibit 52 Chart: Partisan Characteristics of Districts: Conference Plan.
Exhibit 53 Chart: Partisan Characteristics of Districts: 1992 Plan.
Exhibit 54 Chart: Partisan Characteristics of Districts: 2nd Alternative Plan.
Exhibit 56 Untitled [Compilation of data].

The following stipulated exhibits were also admitted: Petitioners' Exhibit 37 (Resume of Dr. David Lublin) and Respondents' Exhibit 1 (Table: Voter Registration with New 2001 Congressional Districts). The following Petitioners' exhibits were admitted solely as "maps" (*see* Tr. at 204):

Exhibit 13 Map: 2001 Congressional Reapportionment 1st Alternative Plan.
Exhibit 17 Map: 2001 Congressional Reapportionment 2nd Alternative Plan.
Exhibit 55 Map: 2001 Congressional Reapportionment 3rd Alternative Plan.

Findings based on those maps were made together with Exhibit 56.

Because the Supreme Court had assumed plenary jurisdiction and could remand if it found the record was

inadequate for it to make a decision, where challenges were made to evidence and where possible, discretion was exercised in favor of admitting evidence and testimony. Judicial notice has also been taken of certain information that has been attached as an Appendix to Presiding Officers' brief and not introduced at trial.

On February 6, 2002, Petitioners filed an Application to Supplement the Record on the issue of standing which, on February 7, 2002, was denied.

Recommended Findings of Fact

1. Petitioners are JoAnn Erfer or Jeffrey B. Allen who are individuals with standing to maintain this action.

2. Respondents are the Commonwealth of Pennsylvania, Mark Schweiker, Governor of Pennsylvania; Kim Pizzingrilli, Secretary of the Commonwealth; Richard Filling, Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State; Robert C. Jubelirer, Lieutenant Governor and President of the Senate of Pennsylvania; and Matthew J. Ryan, Speaker of the House of Representatives of Pennsylvania.

Background

3. When congressional seats were reapportioned after the 2000 Census, Pennsylvania lost two seats, dropping from 21 to 19. *See* Section 1 of Act I (noting that the Commonwealth was to be divided into 19 congressional districts); *Mellow v. Mitchell, 530 Pa. 44, 607 A.2d 204 (1992)* (Appendix A, dividing the Commonwealth into 21 districts); Tr. at 20 (Hoeffel) (noting that Act 1 "represents 19 seats down from our current 21").

4. Under the 1990 Census, Pennsylvania's total population was 11,881,643, making the "ideal" population for each of Pennsylvania's 21 congressional seats 565,792 or 565,793. *See Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992) (Appendix A).

5. Under the 2000 Census, Pennsylvania's total population was 12,281,054, making the "ideal" population for each of Pennsylvania's 19 congressional districts 646,371 or 646,372. *See* THE PENNSYLVANIA MANUAL, *Local Government* (115th edition.) (available on the Pennsylvania Department of State website at www.dgs.state.pa.us/ PAManual/home.htm). (Appendix ("App.") Tab D contains copies of all data obtained from the Local Government section of the 115th edition of THE PENNSYLVANIA MANUAL).

6. The total population in Philadelphia decreased from 1,585,577 in 1990 to 1,517,550 in 2000. *See* THE PENNSYLVANIA MANUAL, *Local Government* (115th ed.) (App. Tab D).

7. The total population in Allegheny County decreased from 1,336,449 in 1990 to 1,281,666 in 2000, and the population of the City of Pittsburgh decreased from 369,879 in 1990 to 334,563 in 2000. *See* THE PENNSYLVANIA MANUAL, *Local Government* (115th ed. 2001) (App. Tab D); THE PENNSYLVANIA MANUAL *Local Government* (114th ed. 1999) (App. Tab F).

8. Between 1990 and 2000, significant population growth occurred in the counties surrounding Philadelphia (Chester, Montgomery, Delaware & Bucks), and the Pocono Region (Monroe, Pike & Wayne) as the following chart shows:

County	1990 Population	2000 Population Bucks
Bucks	541,174	597,635
Chester	376,396	433,501
Delaware	547,651	550,864
Monroe	95,709	138,687
Montgomery	678,111	750,097
Pike	27,966	46,302
Wayne	39,944	47,722

THE PENNSYLVANIA MANUAL, *Local Government* (115th ed.) (App. Tab D).

9. As of 2001, Pennsylvania has 67 counties and 2,569 cities, townships and boroughs. *See* THE PENNSYLVANIA MANUAL, Local Government (115th ed.) (App. Tab D).

10. Official voter registration data for November 2000 shows there were 7,781,997 registered voters in Pennsylvania: 3,250,764 (41.8%) Republicans; 3,736,304 (48.0%) Democrats; 7,918 (00.1%) Constitution; 30,248 (00.4%) Libertarian; 756,763 (09.7%) Other. *See* Certification No. 2002-11b, Office of the Secretary of the Commonwealth (App. Tab G).

11. Official voter registration data for November 2001 shows there were 7,773,403 registered voters in Pennsylvania: 3,233,171 (41.6%) Republicans; 3,733,766 (48.0%) Democrats; 3,268 (00.04%) Green; 803,198 (10.3%) Other. *See* Certification No. 2002-11b, Office of Secretary of the Commonwealth (App. Tab G).

12. Currently (elected in 2000 under the 1992 court-ordered congressional redistricting plan), there are 11 Republicans and 10 Democrats in Pennsylvania's congressional delegation. *See* THE PENNSYLVANIA MANUAL, *Federal Government* (115th ed.) (App. Tab H).

13. Under the 1992 court-ordered congressional redistricting plan, Montgomery County was split among five congressional districts with the majority in the 13th district. *See Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992) (Appendix A).

14. Under the 1992 court-ordered congressional redistricting plan (based on the legal description), 16 counties were split, 12 municipalities (cities, townships and boroughs) were split, 4 wards were split. Three of the above municipalities were split at the census block level. *See Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992) (Appendix A).

15. Congressman William Coyne (Democrat) representing the 14th district located in Allegheny County, has announced he will not seek reelection. Tr. at 70 (Lublin) and App. Tab H.

16. There were two statewide elections in 1998 – U.S. Senator and Governor. In the election for U.S. Senator, of the 2,957,499 votes cast, the Republican candidate received 1,814,180 (61.3%), the Democrat candidate received 1,028,839 (34.8%), and the two other candidates received 114,480 (3.9%) of the votes. In the election for Governor, of the 3,024,941 votes cast, the Republican candidate received 1,736,844 (57.4%), the Democrat candidate received 938,745 (31.0%), and the other candidate received 349,352 (11.5%) of the votes. Certification No. 2002-10b, Office of the Secretary of the Commonwealth (App. Tab I).

17. In the only statewide race in 1999 (Superior Court Judge), of the 4,023,279 total votes cast (two positions were open), the two Republican candidates received a total of 2,075,561 (51.6%) and the two Democrat candidates received a total of 1,947,718 (48.4%) (one Republican and one Democrat were elected). Certification No. 2002-10b, Office of the Secretary of the Commonwealth (App. Tab 1).

18. There were five statewide races in 2000 (President, U.S. Senator, Attorney General, Auditor General, State Treasurer). The following chart shows the results:

	Total Votes Cast	Republican Candidate
President	4,912,185	Election
U.S. Senator	4,735,116	2,481,962 (52.4%)
Attorney General	4,619,438	2,495,253 (54.0%)
Auditor General	4,664,541	1,862,934 (39.9%)
State Treasurer	4,680,934	2,307,422 (49.3%)

	Total Votes Cast	Democrat Candidate	Other Candidate
President	4,912,185	2,485,967 (50.6%)	145,091 (3.0%)
U.S. Senator	4,735,116	2,154,908 (45.5%)	98,246 (2.1%)
Attorney General	4,619,438	1,991,144 (43.1%)	133,041 (2.9%)
Auditor General	4,664,541	2,651,551 (56.9%)	150,056 (3.2%)
State Treasurer	4,680,934	2,211,471 (47.2%)	162,041 (3.5%)

Certification No. 2002-10b, Office of the Secretary of the Commonwealth (App. Tab I).

19. There were seven statewide races in 2001 (Supreme Court Justice, three Commonwealth Court Judges, three Superior Court Judges). The following chart shows the results (all seven Republican candidates won):

Election	Total Votes Cast	Republican Candidate(s)	Democrat Candidate(s)	Other Candidate
Supreme Court	2,005,422	1,051,360 (52.4%)	954,062 (47.6%)	0
Common wealth Court	5,275,158	2,839,610 (53.8%)	2,435,548 (46.2%)	0
Superior Court	5,376,773	2,899,151 (53.9%)	2,477,622 (46.1%)	0

Certification No. 2002-lOb, Office of the Secretary of the Commonwealth (App. Tab I).

Enactment of Act No. 2002-I

20. Senate Bill 1200 was introduced on November 16, 2001. *See* Legislative History of SB 1200 (available, along with all versions of SB 1200 through the Electronic Bill Room on the General Assembly's website (www.legis.state.pa.us/WUOI LI/BI/billroom.htm)) (App. Tab A).

21. Congressman Joseph Hoeffel (D) testified before the Joint Hearing of the Senate and House State Government Committees on redistricting on November 27, 2001. Tr. at 29-30 (Hoeffel).

22. Congressman Frank Mascara (D) submitted written testimony to the Joint Hearing of the Senate and House State Government Committees on redistricting on November 28, 2001. Tr. at 116 (Mascara).

23. On December 10, 2001, the Senate passed SB 1200, PN 1531, which provided the legal descriptions for 19 congressional districts. Legislative History of SB 1200 (App. Tab A); SB 1200, PN 1531.

24. During debate in the Senate, a member of the Democrat Caucus offered A4552 as an amendment to SB 1200. *See* LEGISLATIVE JOURNAL-SENATE (Dec. 10, 2001) at 42-44 (App. Tab J). The amendment was defeated 27-22. *Id.*

25. The Senate declined to concur in the House amendment to SB 1200. *See* Legislative History of SB 1200 (App. Tab A).

26. The Senate and the House each appointed three members as conferees to a conference committee on SB 1200; the conferees for the House were Reps. Smith, Barley and Veon and the conferees for the Senate were Senators Brightbill, Piccola and Mellow. *See* Legislative History. Rep. DeWeese was not a conferee. Tr. at 149 (DeWeese).

27. On January 2, 2002, the Conference Committee reported a version agreed to by four of the six members (Reps. Smith and Barley and Senators Brightbill and Piccola). *See* SB 1200, PN 1645 (App. Tab B).

28. On January 3, 2002, the Senate, after debate, passed the Conference Committee Report on SB 1200 by a 28-22 vote. *See* Legislative History of SB 1200 (App. Tab A).

29. On January 3, 2002, the House, after debate, passed the Conference Committee Report on SB 1200 by a 139-52 vote, with 42 Democrats voting in favor of the bill. *See* Legislative History of SB 1200 (App. Tab A) and Tr. at 31-32, 107-08, 149-50.

30. Forty-two of the 98 members of the Democrat Caucus of the House of Representatives voted in favor of Act 1. Tr. at 149-150 (DeWeese). Without the vote of the 42 House Democrats, Act 1 would not have passed. *See* PA. CONST. art. II. § 10 (102 votes are needed for final passage); Proposed Finding of Fact 29 (final vote was 132-59).

After certification by the Presiding Officers of the Senate and House, SB 1200 was forwarded to Governor Schweiker,

who, on January 7, 2002, signed SB 1200 into law as Act No. 2002-1 ("Act 1"). *See* Certified Copy of the Act 1 (App. Tab C); *see also* Legislative History of SB 1200 (App. Tab A).

The Effect of Act 1

30. Of the 19 districts put in place under Act 1, voter registration figures for the districts as of 2000 show that seven have a majority Republican registration and seven have a majority Democrat registration. Of the remaining five districts, three have a plurality Republican registration and two have a plurality Democrat registration. Respondents' Ex. I. The chart below shows the actual registration figures and percentages for each of the 19 districts:

Congressional District	Republican Registration	Democrat Registration	Other
1	83,648 (19.69%)	314,219 (73.96%)	26,967 (6.35%)
2	62,564 (13.65%)	360,599 (78.65%)	35,312 (7.70%)
3	171,435 (44.05%)	182,454 (46.89%)	35,263 (9.06%)
4	168,115 (38.55%)	225,631 (51.74%)	42,353 (9.71%)
5	190,842 (50.88%)	145,735 (38.86%)	38,481 (10.26%)
6	209,105 (49.87%)	150,634 (35.92%)	59,600 (14.21%)
7	279,835 (62.03%)	119,762 (26.55%)	51,547 (11.42%)
8	208,392 (48.75%)	160,289 (37.50%)	58,791 (13.75%)
9	190,087	137,561	31,714

	(52.90%)	(38.28%)	(8.82%)
10	198,012 (52.06%)	147,823 (38.86%)	34,520 (9.08%)
11	135,536 (34.92%)	217,168 (55.96%)	35,389 (9.12%)
12	107,919 (27.30%)	259,845 (65.74%)	27,513 (6.96%)
13	209,502 (47.79%)	187,967 (42.88%)	40,882 (9.33%)
14	78,419 (17.31%)	335,317 (74.04%)	39,173 (8.65%)
15	164,599 (41.98%)	174,188 (44.43%)	53,273 (13.59%)
16	214,334 (57.52%)	106,083 (28.47%)	52,213 (14.01%)
17	203,089 (52.87%)	141,621 (36.86%)	39,443 (10.27%)
18	167,683 (37.05%)	242,385 (53.55%)	42,544 (9.40%)
19	207,675 (54.11%)	126,830 (33.04%)	49,318 (12.85%)

31. Under Act 1, Montgomery County is split among six congressional districts with the largest portion in the 13th district. *See* Section 1 of Act 1 (Legal Description). Under the court-ordered 1992 plan, Montgomery County was split among five congressional districts.

32. Under Act 1, there are five congressional districts in which it is safe to assume an incumbent Democrat congressman will win re-election (if the incumbent runs) in 2002. The five congressmen are Reps. Murtha, Kanjorski, Fartah, Brady and Doyle. Tr. at 22 (Hoeffel); Tr. at 165, 179,

189 (Ceisler).

33. Under Act 1, there is a district (District 6) in which no incumbent resides. Tr. at 33. 18 (Hoeffel).

34. Congresswoman Melissa Hart (District 4), a Republican, currently represents a district with a majority of registered Democrat voters, *see* Tr. 38 (Hoeffel). Under Act 1, District 4 continues to have a majority of registered Democrat voters (51.7% Democrat to 38.5% Republican). Respondents' Ex. 1.

Hearing Evidence

36. At the hearing, Petitioners presented evidence from six witnesses, including two sitting members of Congress, one member of the Pennsylvania General Assembly, and two expert witnesses. Respondents chose to present no witnesses, but did enter into the record evidence of voter registration totals in the districts created by Act 1.

37. Registered Democrat voters in Pennsylvania frequently "split" their votes among the candidates of various parties and "cross-over" to vote for Republican candidates. Tr. at 35 (Hoeffel); Tr. at 103 (Mascara); Tr. at 196 (Ceisler); *see* Proposed Findings of Fact 16-19.35.

38. The Pennsylvania Democrat party, according to Petitioners' witness, consists of "people who hold office in the Democratic party, people who aspire to hold office in the Democratic party, Democrats who have Democratic party ideals and vote Democratic." Tr. at 195 (Ceisler).

39. In Pennsylvania, only registered Democrat voters can sign nominating petitions and vote for those seeking to be

nominated as the Democrat candidate for public office. Section 802 of the Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, as *amended, 25 P.S. § 2832.*

40. Registered Republican voters in Pennsylvania frequently "split" their votes among the candidates of various parties and "cross-over" to vote for Democrat candidates. Tr. at 194 (Ceisler); *see* Proposed Findings of Fact 16-19.

41. Dr. David Lublin, an Assistant Professor of Government at American University and an expert in voting rights, redistricting and the statistical study of elections and redistricting plans, testified for Petitioners concerning the likely partisan effect of Act 1. Exh. 37; Tr. at 51:6-52:11 (Lublin).

42. In analyzing Act 1, Dr. Lublin used voting data from 19 prior statewide elections - including all of the federal statewide elections and all statewide executive office races from the 1990s - to analyze how the people in Act 1's districts would have voted under a variety of electoral conditions. Exhs. 39, 44, 56; Tr. at 54:13-55:11 (Lublin). Through this technique of "reaggregating" elections from the 1990s, Dr. Lublin was able to determine how particular districts in Act 1 lean *(i.e.,* Republican or Democratic) and whether particular incumbents are likely to be re-elected. Tr. 54:15-56:12 (Lublin).

43. To determine which way districts lean, Professor Lublin computed an average of votes on a district-by-district basis and then determined how many districts performed above or below that average for a party.

44. To determine whether a particular incumbent was likely

to be re-elected, Dr. Lublin also looked at the districting plan that was in effect throughout the 1990s. For those incumbents who have historically won in districts that lean against the incumbent's party, Dr. Lublin assumed they would continue to win if the district did not change very much. Tr. at 55:19-56:12 (Lublin).

45. Petitioners also presented the testimony of Mr. Larry Ceisler, a political consultant and expert in Pennsylvania politics. Mr. Ceisler used his experience and knowledge of Pennsylvania and past elections to explain the likely impact of Act 1 as well as the impetus behind its passage. Tr. at 157:15-160:22, 165:03-04, 165:19-167:22, 168:08-19, 170:24-171:23; 173:24-174:15, 175:17-176:10, 176:20-177:12, 192:07-11 (Ceisler).

The Effect of Act 1 on Party Membership on the Congressional Delegation

46. Act 1, the congressional redistricting plan passed by the General Assembly in January 2002 and signed into law by the Governor, creates only five or six districts that Democrats are likely to win out of 19, giving Republicans a 13-6 or 14-5 likely advantage in the Pennsylvania congressional delegation - even if they receive less than half the votes cast, in which case there is a reasonable likelihood that Democratic candidates will be able to prevail in 2002 and beyond.

47. Act 1 pairs two incumbent Democratic Congressmen into District 13, Congressmen Hoeffel and Borski. Exh. 7; Tr. at 18:14-18:16 (Hoeffel). Congressman Hoeffel testified that it is highly probable that Congressman Borski would defeat him in the Democratic primary but he would lose the general election to a moderate Republican from the Montgomery

County portion of District 13. About 53 percent of the 13th District's population live in Montgomery County and about 47 percent live in Philadelphia. Tr. at 19:7-19:19 (Hoeffel). Indeed, Melissa Brown, a Republican from Montgomery County, has already announced her intention to run. Tr. at 19:20-20:13 (Hoeffel). Brown, who is pro-choice, would likely defeat the pro-life Congressman Borski. Tr. at 166:07-167:22 (Ceisler).

48. Under Act 1, Congressman Holden, a Democrat, who is paired in the 17th District with Congressman Gekas, a Republican, is likely to be defeated in a seat that strongly favors the Republican. Exh. 6; Tr. at 21:15-21:18 (Hoeffel). Act 1 also pairs Democratic Congressmen Doyle and Coyne; Coyne has indicated he will retire.

49. Congressman Mascara is not paired with an incumbent, but Act 1 places him in a radically reconfigured district which heavily favors a specific Republican challenger - State Senator Tim Murphy. Tr. at 97:24-99:09, 109:15-23 (Mascara).

50. Act 1 congressional districts have wide disparities in the proportion of constituents that Democratic and Republican incumbents retain from their old districts.

51. The congressional districts drawn by Act 1 was for the purpose and intent to elect more Republican members to Congress than Democrats. See, e.g., Exhs. 6, 39, 40, 48, 50; Tr. at 53:10-15, 64:14-68:10 (Lublin); 165:03-04 (Ceisler).

District Lines

52. Under Act 1, lines were drawn using census tracts rather than precincts, i.e., voting or election districts. Act 1 splits six election precincts or voting districts into multiple congressional districts, doubling the number of precinct splits in the 1992 plan. Act 1; Exh. 56 at 25, 28.

53. Act 1's District 6 is an irregular, "dragon-shaped" district that covers three counties in southeast Pennsylvania and includes several wholly distinct, unconnected communities of interest. Exh. 7; Tr. at 16:9-16:24 (Hoeffel). District 6 is centered in rural Chester County, extends deeply into Berks County, and then comes into Montgomery County at Limerick Township just below Pottstown, includes the borough of Pottstown itself, swings to the east and then down towards the south through the center of Montgomery County to pick up the county seat of Norristown and Lower Merion Township. Exh. 7; Tr. at 16:9-16:24 (Hoeffel). In so doing, District 6 combines the relatively unrelated rural parts of Chester and Berks County with the "densely settled suburban" communities of Norristown, Plymouth, Lower Merion and Narberth in Montgomery County. Exh. 7; Tr. at 16:18-16:24 (Hoeffel).

54. Act I divides up western Pennsylvania as can best be seen by the jagged and irregular line between Districts 12 and 18.

55. Act 1's districts are significantly less compact than under prior plans in Pennsylvania. Professor Lublin analyzed compactness using two separate measures - "Perimeter Measure" and "Dispersion Measure" - that are generally accepted in Professor Lublin's field and widely used in

redistricting cases. Exh. 42; Tr. at 78:12-78:15 (Lublin). Using Professor Lublin's "Perimeter Measure Analysis," four of Act 1's districts - Districts 1, 6, 12 and 18, are less compact than the least compact district under the 1992 plan. Exh. 42. On average, Act 1's districts are less compact than those in prior decades. Exh, 42; Tr. at 80:1-5 (Lublin).

56. Act 1 divides 65 municipalities in comparison with only 13 municipal splits in the 1992-2001 map, a fivefold increase. Tr. at 177:04-12 (Ceisler). Petitioners' Alternate Plans 1 and 2 split only 18 municipalities. Tr. at 177:04-19 (Ceisler). District 12 by itself splits more than 20 townships. Exh. 6. Act 1 also splits *25* counties into multiple districts, up from 18 county splits under the 1992 plan. Exh. 6; Exh. 56, at 25-27.

Alternate Plans

57. Petitioners submitted into evidence three alternative redistricting plans to highlight the bias in Act 1. Exhs. *13,* 17, *55.* Exhibits 13, 17 and 55 are labeled alternative plans 1, 2 and 3, respectively.

58. None the alternative plans were before the General Assembly. Tr. at 80 (Petitioners' counsel). *See* Exhibits 13, 17 and 55. Petitioners' Exhibit 56 is composed of all the data on which Dr. Lublin relied, including data on compactness, population deviation, electoral results, etc. Exh. *56,* Tr. at 80:9-13 (Lublin). All data used by Dr. Lublin was derived from the General Assembly through the House Minority Demographics office. Tr. at 55:8-55:11 (Lublin). All conclusions are based on the accuracy of Exh. 56, at 19. 21. 22.

59. Alternate Plans 1 and 2 split no precincts. Exh. 56, at 21-24, 29-32. Splitting election precincts will cause problems "for ballot tabulation, counting and casting." Tr. at 125:5-127:12, 128:14-128:18 (Spahr).

60. Both Alternate Plans 1 and 2 would likely result in a 10-9 Republican advantage in Pennsylvania's congressional delegation. Exhs. 47, 49, 50; Tr. at 53:15-19, 73:21-74:8 (Lublin); Tr. at 177:20-25 (Ceisler). Alternates 1 and 2 would pair one set of Democrats and one set of Republicans. Tr. at 179:10-16 (Ceisler). Each eliminates one incumbent Democrat and one incumbent Republican. Exh. 13; 22:22-23:17 (Hoeffel).

61. Alternate Plans 1 and 2 also have more compact districts on average than Act 1. Exh. 42; Tr. at 80:1-5 (Lublin). Alternate Plans 1 and 2 split fewer counties and municipalities than Act 1. Plaintiffs' 1st Alternate Plan splits 24 counties, 18 municipalities, 0 precincts. Exh. 56, at 29-30. Plaintiffs' 2nd Alternate Plan splits 23 counties, 18 municipalities. 0 precincts. Exh. 56, at 31-32.

62. Plaintiffs' 1st Alternate Plan has a maximum population deviation of 19 people (646,361 people in District 7, 646,380 people in District 8). Exh. 56, at 21. Plaintiffs' 2nd Alternate Plan has a maximum population deviation of 15 people (646,365 people in District 14, 646,380 people in Districts 16 and 19). Exh. 56, at 23.

CONCLUSIONS OF LAW

1. Because the Commonwealth has withdrawn its preliminary objections, it has waived the issue of Petitioners' standing. Pa. R. C. P. No. 1019; *In Re: Estate of Alexander*, 758 A.2d 182 (Pa. Superior Ct. 2000). Presiding Officers still

have outstanding preliminary objections, including one addressing standing, and until those preliminary objections are heard, Petitioners are presumed to have standing for the purpose of this proceeding.

2. Petitioners bear the burden of proving that Act 1 is unconstitutional. *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975); *In re Ross Township Election District Reapportionment*, 489 A.2d 297 (Pa. Cmwlth. 1985). There is a presumption in favor of constitutionality and "all doubt is to be resolved in favor of sustaining the legislation." *Id.* (quoting *Milk Control Commission v. Battista*, 413 Pa. 652, 659, 198 A.2d 840, 843 (1964)). "An Act of Assembly will not be declared unconstitutional unless it *clearly, palpably and plainly* violates the Constitution." *Singer*, 464 at 393, 346 A.2d at 900 (quoting *Daly v. Hemphill*, 411 Pa. 263, 271, 191 A.2d 835, 840 (1963)) (emphasis added). The standard is no different when the challenge is to a redistricting plan. *In re Ross Township Election District Reapportionment*, 489 A.2d 297 (Pa. Cmwlth. 1985), *affd.*, 514 Pa. 41, 522 A.2d 553 (1987).

3. Article I, Section 4, Clause 1 of the United States Constitution provides that, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof: ....."

4. Article 2, § 16 of the Pennsylvania Constitution provides for the reapportionment of the General Assembly. It states that:

> The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative

> district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

5. Article 2, § 11 of the Pennsylvania Constitution requires and provides for the reapportionment of local municipalities, providing:

> Within the year following that in which the Federal decennial census is officially reported as required by Federal law, and at such other times as the governing body of any municipality shall deem necessary, each municipality having a governing body not entirely elected at large shall be reapportioned, by its governing body or as shall otherwise be provided by uniform law, into districts which shall be composed of compact and contiguous territory as nearly equal in population as practicable, for the purpose of describing the districts for those not elected at large.

6. While 19 states have adopted state constitutional provisions regulating Congressional reapportionment, at least one of which mandated districts that were "contiguous and compact," *see Brown v. Saunders*, 159 Va. 28, 166 S.E. 195 (Va. 1932) (discussion of Section 55 of the Virginia Constitution), there is no Pennsylvania constitutional provision specifically dealing with Congressional reapportionment.

7. Although the General Assembly derives its authority over congressional redistricting from the U.S. Constitution, and there is no express state constitutional provision regulating congressional reapportionment, it does not follow that any other applicable provisions of the Pennsylvania Constitution would not be controlling on the Pennsylvania

General Assembly. The General Assembly is created by the Pennsylvania Constitution and is bound by its provisions. To find otherwise would mean that the 19 State Constitutions that have specific constitutional provisions would not be binding on their legislatures.

8. Article 1, § 5 of the Pennsylvania Constitution provides that:

> Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

9. In the context of a challenge to reapportionment by the General Assembly, Article 1, § 5 of the Pennsylvania Constitution, has been interpreted as follows:

> Elections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, ... and when no constitutional right of the qualified elector is subverted or denied him.

In re 1991 Pennsylvania Legislative Reapportionment Commission, 530 Pa. 335, 356, 609 A.2d 132, 142 (1992), quoting from *City Council of City of Bethlehem v. Marcincin*, 512 Pa. 1, 8, 515 A.2d 1320, 1232 (1986) (quoting *Shankey v. Staisey*, 436 Pa. 65, 69, 257 A.2d 897, 898 (1969), *cert. denied*, 396 U.S. 1038, 24 L. Ed. 2d 682, 90 S. Ct. 684 (1970)).

10. In *In re 1991 Pennsylvania Legislative Reapportionment Commission*, our Supreme Court addressed a claim of political gerrymandering, a claim of deprivation of free and equal elections, and a violation of equal protection under the state constitutional provisions at issue here and the [14]th Amendment to the United States Constitution. Without making a separate analysis for each issue, it found determinative of all the state and federal constitutional claims the three-prong test set forth by the Supreme Court of the United States in *Davis v. Bandemer*, 478 U.S. 109 (1986). That analysis requires that the plaintiff establish:

> 1. intentional discrimination against an identifiable political group;
>
> 2. an actual discriminating effect on that group; and
>
> 3. a history of disproportionate results appear[ing] in conjunction with strong indicia of lack of political power and the denial of fair representation.

In adopting the *Bandemer* analysis, the Pennsylvania Supreme Court went on to state that, "this Court is persuaded by the holding of the Supreme Court of the United States with regard to the elements of a prima facie case of political gerrymandering." *In re 1991 Pennsylvania Legislative Reapportionment Commission*, 530 Pa. at 355, 609 A.2d at 142.

11. No Pennsylvania cases have addressed whether Article 1, § 5 of the Pennsylvania Constitution applies to congressional redistricting processes. It appears that in order to make out a violation of Article 1, § 5 within the context of congressional redistricting, the same elements that must be

shown for a violation under the equal protection clause of the Fourteenth Amendment and Article I, §§ 1 & 26 of the Pennsylvania Constitution must be met. *In re 1991 Pennsylvania Legislative Reapportionment Commission.*

12. Article 1, § 26 of the Pennsylvania Constitution provides:

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

13. Article 1, § 1 of the Pennsylvania Constitution provides that:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

14. Article I, §§ 1 & 26, together, constitute an equal protection guarantee. *See Love v. Borough of Stroudsburg*, 528 Pa. 320, 597 A.2d 1137 (1991). The guarantee promises protection at least as strong as the Equal Protection Clause of the United States Constitution's Fourteenth Amendment. If Act 1 violates the Fourteenth Amendment's Equal Protection Clause, it *a fortiori* violates Pennsylvania's equal protection guarantee.

15. Partisan gerrymandering cases in congressional redistricting are justiciable under the Pennsylvania Constitution. *In re 1991 Pennsylvania Legislative Reapportionment Comm'n.*

16. Petitioners contend that their rights under Article 1, § 5 to a free and equal election and Article I, §§ 1 & 26 to equal protection guaranteed by the Pennsylvania Constitution have been violated because:

- There is no justification for the nineteen vote disparity between Congressional districts. Act 1 violates the constitutional requirement of "one-person-one vote."

- Pennsylvania elections should be structured in such a way that when parties demonstrate equal levels of public support, Congressional Districts must be reapportioned in such a way so as to demonstrate a rough correlation between that support and the number of seats that each party receives. Because Act I allows Republican congressional candidates to gather fewer than half of the votes but more than twice - and perhaps nearly three times - as many seats as Democrats, petitioners argue that Act 1 is outside any margin of error that the Free and Equal Elections clause can be interpreted to permit.

17. The nineteen vote disparity does not violate the one-person-one vote requirement because the deviation is *de minimus*. In *In re Pennsylvania Legislative Reapportionment Commission*, 609 A.2d at 147 (Pa. 1992), our Supreme Court noted that it has approved legislative reapportionment total percentage deviations from ideal district population of:

	Senate	House
1991	1.87%	4.94%
1981	1.93%	2.81%
1971	4.31%	5.45%

18. Even assuming that justification for such a *de minimus* difference was needed, the splitting of municipal boundaries would not be a factor in showing a lack of justification because, unlike for legislative reapportionment, there is no requirement that municipal boundaries be taken into consideration in a Congressional Reapportionment. Moreover, Petitioners failed to meet its burden that the deviation is not justified and that some deviation is unavoidable, no matter what the plan, because census districts, let alone voting districts, are not equal in population.

19. No court has addressed what should be considered an identifiable political group but "as a threshold matter, plaintiffs must show that they are members of an identifiable political group whose voting strength has been diluted. They must first prove that they belong to a politically salient class...", *Karcher v. Daggett*, 462 U.S. 725, 754 (1983) (Stevens, J., concurring), and identify with at least some degree of specificity, what group has been denied an effective vote. *See Shaw v. Reno*, 509 U.S. 630 (1993).

20. Because out of the 19 districts created under Act 1, seven have a majority Republican registration and seven have a majority Democrat registration, and of the remaining five districts, three have a plurality Republican registration and two have a plurality Democrat registration, Petitioners make no claim that voters registered as Democrats have been discriminated against. But they do claim that because of ticket splitting, census tracts, in which voters that are registered in one party often ticket split to vote another way or on an issue, have been amalgamated in such a way to give Republicans the advantage.

21. Voters who are likely to vote Democratic (or Republican) in a particular district though not registered

Democrats (or Republicans) based on the candidates or issues are not an identifiable political salient class necessary to establish a violation under Article I, § 5 and Article I, § § 1 & 26 of the Pennsylvania Constitution. *See* Conclusion of Law 10 & 19.

22. While the congressional districts were drawn to give Republican candidates and Republican incumbents an advantage through a sophisticated analysis of voting trends, matching of issues, matching of potential candidates and residency of candidates, none of that conduct discriminates against any identifiable political group. Because they have not shown that the rights of any identifiable political group have been violated, Petitioners have failed to set forth a cause of action that Article I, § 5 and Article I, §§ 1 & 26 of the Pennsylvania Constitution have been violated.

23. Art. 1, § 7 of the Pennsylvania Constitution provides:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction, shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to

determine the law and the facts, under the direction of the court, as in other cases.

24. Petitioners have failed to propose any findings or conclusion regarding and, in any event, the Petition fails to state a claim for which relief can be granted on this claim.

25. Article I, § 20 of the Pennsylvania Constitution provides that:

> The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

26. Petitioners have failed to propose any findings or conclusion regarding Article I, § 20, and, in any event, the Petition fails to state a claim for which relief can be granted on this claim.

27. Because Petitioners have failed to make out a claim that any provision of the Pennsylvania Constitution has been violated, their Petition should be dismissed.

Respectfully submitted,

DAN PELLEGRINI, JUDGE

COMMONWEALTH COURT OF PENNSYLVANIA

AMENDED RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Paragraph 5 of the Recommended Conclusions of Law is amended to read:

5. Article 9, § 11 of the Pennsylvania Constitution requires and provides for the reapportionment of local municipalities, providing:

> Within the year following that in which the Federal decennial census is officially reported as required by Federal law, and at such other times as the governing body of any municipality shall deem necessary, each municipality having a governing body not entirely elected at large shall be reapportioned, by its governing body or as shall otherwise be provided by uniform law, into districts which shall be composed of compact and contiguous territory as nearly equal in population as practicable, for the purpose of describing the districts for those not elected at large.

Respectfully submitted,

DAN PELLEGRINI, JUDGE

Commonwealth Court of Pennsylvania

AMENDED RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Paragraph 46 of the Recommended Findings of Fact is amended to read:

46. Act 1, the congressional redistricting plan passed by the General Assembly in January 2002 and signed into law by the Governor, creates only five or six districts that Democrats are likely to win out of 19, giving Republicans a 13-6 or 14-5 likely advantage in the Pennsylvania congressional delegation - even if they receive less than half the votes cast, in which case there is a reasonable likelihood that Republican candidates will be able to prevail in 2002 and beyond.

Respectfully submitted,

DAN PELLEGRINI, JUDGE

Commonwealth Court of Pennsylvania

DISSENTING OPINION

Filed: March 15, 2002

MR. CHIEF JUSTICE ZAPPALA

I find that the General Assembly's plan violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and would remand with directions to the General Assembly to reapportion the federal congressional districts. The evidence presented before the Commonwealth Court establishes that the current reapportionment plan was formulated so as to intentionally discriminate and dilute the vote of an identifiable political group and had an actual discriminatory effect on that group.[1]

Although I agree with the majority's resolution of the standing issue, I feel compelled to address the overzealous nature of the arguments made in this regard. The unusual argument has been made that Petitioners lacked standing to bring this challenge to the congressional reapportionment

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[1] This case is distinguishable from *Albert v. 2001 Legislative Reapportionment Comm'n*, 2002 Pa. LEXIS 317, 2002 WL 241297 because there the challengers failed to establish the elements of political gerrymandering. The challengers in *Albert* primarily focused upon the compactness and contiguousness of their individual districts. Their claims did not object to the plan as a whole. Here, Petitioners offered sufficient evidence of the unconstitutional statewide impact of the congressional redistricting plan.

plan because they failed to demonstrate that they have never voted for a political candidate who was not a Democrat. It is asserted that Petitioners did not establish standing to complain on behalf of the Democratic Party for that reason.

It would come as a great surprise to registered Republicans or Democrats who have cast votes in elections for candidates who were not members of the same party that they are not "true" Republicans or Democrats, but instead some unidentifiable political group. It is suggested that a voter in this Commonwealth must always choose the candidate offered by his or her own party in order to be a "true" Republican or Democrat. No voter can fail to represent his or her party by selecting the candidate believed to be the best-suited to represent the citizens of this Commonwealth.

In the final analysis, it is the individual who possesses integrity, sound judgment and the ability to lead, rather than follow, who will truly serve his or her constituents. These qualities are not within the exclusive domain of any political party. When voting patterns are used then as the foundation to ensure the continued success of one particular party, as here, the principles of the U.S. Constitution are defeated and we are all ill-served.

The assertion that Petitioners lack standing to enforce those constitutional principles has no support in our jurisprudence. It is claimed that Petitioners failed to establish that they have standing to pursue a political gerrymandering claim because they have failed to show individualized harm and have alleged and presented only harm to a group. It is argued that the group's interest in litigation challenging a statewide plan as a partisan gerrymander could be asserted by the Pennsylvania Democrat State Committee or its leaders.

As noted by the majority, this Court examined the principle of standing in the context of a challenge to the reapportionment of state legislative districts in *Albert*. We held that "any entity not authorized by law to exercise the right to vote in this Commonwealth lacked standing to challenge the reapportionment plan." *Id.* at *3. This holding did not represent a new principle of law; instead it followed the well-established test for standing articulated by this Court in *William Penn Parking Garage, Inc. v. Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (Pa. 1975) and the U.S. Supreme Court's decision in 1964 in *Reynolds v. Sims*, 377 U.S. 533 (1964).

We stated in *Albert* that

> it is the right to vote and the right to have one's vote counted that is the subject matter of a reapportionment challenge. Significantly, as noted by the United States Supreme Court in Reynolds v. Sims, the right to vote is personal and the rights sought to be vindicated in a suit challenging an apportionment scheme are personal and individual *377 U.S. at 554-555* (citing *United States v. Bathgate, 246 U.S. 220, 227, 62 L. Ed. 676, 38 S. Ct. 269 (1916)); South v. Peters, 339 U.S. 276, 280, 94 L. Ed. 834, 70 S. Ct. 641 (1950).*

Id. at *3.

Following the narrow framework of their view of standing, Respondents have developed their argument that Petitioners have failed to demonstrate a violation of the Equal Protection Clause of the Fourteenth Amendment. Although this analysis would deny a registered voter the opportunity to raise a constitutional challenge on behalf of his or her political party, and limit this right to some

nebulous prototype voter, this Court has not done so. Instead, we have recognized that protection is afforded to the voter, rather than to a party.

In *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality opinion), the United States Supreme Court addressed an equal protection challenge to Indiana's 1981 legislative reapportionment of the state's legislative districts pursuant to the 1980 census. The appellees, several Indiana Democrats, challenged the reapportionment plan, alleging that the plan constituted a political gerrymander intended to disadvantage Democrats. A three-judge panel of the United States District Court for the Southern District of Indiana was convened to hear the claims. Elections were held under the new districting plan before the case was heard. Two years later, the divided district court issued a decision declaring the reapportionment to be unconstitutional and ordered the legislature to prepare a new plan. The United States Supreme Court reversed. A majority of the Court concluded that political gerrymandering was a justiciable question, but concluded that the district court had applied the incorrect standard in finding unconstitutional vote dilution.

The context in which the equal protection challenge arose is relevant to our discussion. Indiana's legislature consisted of 100 members of the House of Representatives and 50 members of the Senate. The reapportionment plans created 50 single member districts for the Senate; in the House of Representatives, it provided for 7 triple-member, 9 double- member, and 61 single-member districts. County and city lines were not consistently followed, although township lines generally were. Each Senate district was not divided exactly into two House districts and there was little relation between the lines drawn in the Senate and House plans.

When the elections were first held under the new districting plans, all of the House seats and half of the Senate seats were up for election. As described by the Supreme Court, Democratic candidates received 51.9% of the vote over all the House races statewide, but only 43 Democrats were elected to the House. In two counties, which had been divided into multi- member House districts, Democratic candidates obtained 46.6% of the vote, but secured only 3 of 21 House seats. In the races for 25 senatorial seats, Democratic candidates received 53.1% of the statewide vote, resulting in the election of 13 Democrats.

The district court found support for the challengers' position in the election results and concluded that further examination of the circumstances surrounding the reapportionment was warranted. The court noted the irregular shape of district lines, the fact that multi-member districts were suspect in terms of compactness, and that district lines failed to adhere consistently to boundaries of political subdivisions.[2] The court found that explanations offered for the configuration of the districts to be inadequate.

These factors led the district court to conclude that the reapportionment plan had been drawn intentionally to favor Republican incumbents and candidates and to disadvantage Democratic voters. The court found this was achieved by "stacking" Democrats into districts with large Democratic majorities and "splitting" them in other districts so as to give Republicans safe, although not excessive, majorities in those districts. The U.S. Supreme Court described these tactics as

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[2] The district court's analysis of these factors is reflective of the type of analysis undertaken by this Court in addressing challenges to the state reapportionment plan in *Albert*, supra.

> familiar techniques of political gerrymandering. Democratic (or Republican, as the case may be) votes are "stacked" and "wasted" by creating districts where Democrats form majorities much greater than the 50% necessary to carry those districts. Concurrently, Republican votes are spread among districts in which they form safe, perhaps 55% majorities, and Democratic votes are "cracked" or "split" by dispersing them in such a way as to be ineffectual.

478 U.S. at 117, n.6. The district court invalidated the reapportionment plan, finding that the plan had a discriminatory effect in that the proportionate voting influence of Democratic voters had been adversely affected.

Part II of the U.S. Supreme Court's opinion, which was authored by Justice White and joined by five other Justices, addressed the question of whether the case presented a justiciable controversy or a nonjusticiable political question. In addressing that issue, Justice White observed that

> Since *Baker v. Carr*, 369 U.S. 186 (1962), we have consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts. In the course of these cases, we have developed and enforced the "one person, one vote" principle. See, *e.g. Reynolds v. Sims*, 377 U.S. 533 (1964).

478 U.S. at 118.

Justice White further explained that "in formulating the one person, one vote formula, the Court characterized the question posed by election districts of disparate size as an issue of fair representation."

> In such cases, it is not that anyone is deprived of a vote or that any person's vote is not counted. Rather, it is that one electoral district elects a single representative and another district of the same size elects two or more – the elector's vote in the former district having less weight in the sense that he may vote for and his district be represented by only one legislator, while his neighbor in the adjoining district votes for and is represented by two or more.

Id. at 123. "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of State legislators." *Id.* at 123-24 (citation omitted).

He noted that challenges premised upon political gerrymandering differ from those based upon claims that districts of disparate size violated the equal protection clause, stating that

> not only does everyone have the right to vote and to have his vote counted, but each elector may vote for and be represented by the same number of lawmakers. *Rather, the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group.* Nevertheless, the issue is one of representation, and we decline to hold that such claims are never justiciable.

Id. at 124 (emphasis added).

The Court concluded that the fact that the claim was brought by a political group, rather than a racial group or a group claiming that a reapportionment plan diluted the

weight of votes because of place of residence, simply did not justify a refusal to entertain such a claim. "That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated."

Id. at 125.

Having determined that the appellees had presented a justiciable claim, the Court then discussed whether the district court had erred in holding that the appellees had alleged and proved a violation of the equal protection clause. Part III of Justice White's opinion, however, garnered only three other votes.[3] The Court was unable to reach a consensus on the issue of what a claimant must prove in order to establish vote dilution in this context. Discussion of the plurality's analysis is necessary, however, to illustrate the Court's perceived failings in the appellees' presentation of their equal protection claim.

The Court agreed with the district court that in order to succeed the appellees were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group. The Court declined to overturn the district court's finding of discriminatory intent as clearly erroneous, finding that the record presented would support a finding that the discrimination was intentional. Acknowledging the political realities of districting and apportionment, and that "the political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward", the Court observed that "as long as redistricting is done by a

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[3] Justices Brennan, Marshall and Blackmun joined Part III of Justice White's opinion.

legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.* at 129 (footnote omitted).[4]

The Court found, however, that appellees had failed to establish a sufficiently adverse effect on their constitutionally protected rights under the equal protection clause. The district court had identified the political group suffering discrimination as those voters who voted for Democratic Assembly candidates in Indiana's 1981 election and relied primarily on the results of that single election to meet the requirements of a political gerrymandering claim.[5] The Court concluded that relying upon a single election to prove unconstitutional discrimination was unsatisfactory. The Court stated,

> The District Court did not find that because of the 1981 Act the Democrats could not in one of the next few elections secure a sufficient vote to take control of the assembly. Indeed, the District Court declined to hold that the 1982 election results were the predictable consequences of the 1981 Act and expressly refused to hold that those results were a reliable prediction of future ones. The District Court did not ask by what percentage the statewide Democratic vote would have had to increase to control either the House or the Senate. The

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[4] The court cautioned, however, that the fact that intentional discrimination may not be difficult to demonstrate did not relieve a challenger of the burden of proof.

[5] As noted above, in that election Republican candidates received 48.1% of the votes cast statewide for the House of Representatives, but won 57 of the 100 seats to be filled. As for the Senate, Republican candidates received 46.9% of the votes cast statewide, but won 12 of the 25 seats to be filled.

> appellants argue here, without a persuasive response from the appellees, that had the Democratic candidates received an additional few percentage points of the votes cast statewide, they would have obtained a majority of the seats in both houses. *Nor was there any finding that the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980's or that the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census.* Without findings of this nature, the District Court erred in concluding that the 1981 Act violated the Equal Protection Clause.

Id. at 135-36 (emphasis added).

The Court determined that the appellees had failed to demonstrate that there had been an unconstitutional discrimination against members of the Democratic party by premising their claim solely upon the results of a single election. "[A] mere lack of proportionate results in one election cannot suffice in this regard." *Id. at 139.* Equal protection violations will be found only where a history (actual or projected) of disproportionate results appears in conjunction with strong indicia of lack of political power and the denial of fair representation. *Id.* at 139-40.

The Court was not indifferent, however, to the fact that discriminatory effects need not be suffered first before an equal protection claim could be brought. "*Projected* election results based on district boundaries and past voting patterns may certainly support this type of claim even where *no* election has yet been held under the challenged districting." *Id.* at 40 n. 17.

The case before us stands in stark contrast to *Bandemer.* Petitioners here have amply demonstrated that the reapportionment plan improperly diluted the votes of

Democrats in violation of the equal protection clause. As required by the *Bandemer* court, Petitioners have established that the reapportionment plan was intentionally drawn so as to deprive the influence of Democratic voters on the political process as a whole. They have demonstrated also that the plan effectively secures an advantage to Republican candidates of 13-6 or 14-5 in the Pennsylvania congressional delegation. The continual succession of Republican candidates is also achieved by the reasonable likelihood that they will prevail in 2002 and beyond.

Undisputedly, an equal protection challenge will not be sustained merely because particular candidates may not win in any given election. The U.S. Constitution was not designed to promote particular campaigns. What is at stake, and what is entitled to protection, is more sacred. It is the fundamental principle that we are governed by democracy and not oligarchy.

When that fundamental principle is disregarded, as in this case, we have lost more than the representation of a Republican or Democratic elected official in the United States Congress.

Here, Respondents have focused on whether individual voters may be adequately represented by any winning candidate. They have ignored, however, the more significant inquiry posed by the U.S. Supreme Court. The issue is not whether any elected official has the ability to represent his or her constituent. No election, and no constitution, can guarantee any voter capable representation.

The issue is whether the reapportionment plan has denied voters of a fair chance to influence the political process. This inquiry focuses not on the effects of a single election, but on the election process itself. It is when this inquiry is undertaken that the constitutional flaws of this

reapportionment plan are revealed.

The following findings of fact made by Judge Dante Pellegrini of the Commonwealth Court demonstrate a violation of the equal protection clause of the Fourteenth Amendment:

Hearing Evidence

36. At the hearing, Petitioners presented evidence from six witnesses, including two sitting members of Congress, one member of the Pennsylvania General Assembly, and two expert witnesses. Respondents chose to present no witnesses, but did enter into the record evidence of voter registration totals in the districts created by Act 1.

37. Registered Democrat voters in Pennsylvania frequently "split" their votes among the candidates of various parties and "cross-over" to vote for Republican candidates. Tr. at 35 (Hoeffel); Tr. at 103 (Mascara); Tr. at 196 (Ceisler); *see* Proposed Findings of Fact 16-19.35.

38. The Pennsylvania Democrat party, according to Petitioners' witnesses, consists of "people who hold office in the Democratic party, people who aspire to hold office in the Democratic party, Democrats who have Democratic party ideals and vote Democratic." Tr. at 195 (Ceisler).

39. In Pennsylvania, only registered Democrat voters can sign nominating petitions and vote for those seeking to be nominated as the Democrat candidate for public office. Section 802 of the Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. § 2832.

40. Registered Republican voters in Pennsylvania frequently "split" their votes among the candidates of various parties and "cross-over" to vote for Democrat candidates. Tr. at 194 (Ceisler); *see* Proposed Findings of Fact 16-19.

41. Dr. David Lublin, an Assistant Professor of Government at American University and an expert in voting rights, redistricting and the statistical study of elections and redistricting plans, testified for Petitioners concerning the likely partisan effect of Act 1. Exh. 37; Tr. at 51:6-52:11 (Lublin).

42. In analyzing Act 1, Dr. Lublin used voting data from 19 prior statewide elections - including all of the federal statewide elections and all statewide executive office races from 1990s - to analyze how the people in Act 1's districts would have voted under a variety of electoral conditions. Exhs. 39, 44, 56; Tr. at 54:13-55:11 (Lublin). Through this technique of "reaggregating" elections from the 1990s, Dr. Lublin was able to determine how particular districts in Act 1 lean (*i.e.*, Republican or Democratic) and whether particular incumbents are likely to be re-elected. Tr. 54:15-56:12 (Lublin).

43. To determine which way districts lean, Professor Lublin computed an average of votes on a district-by-district basis and then determined how many districts performed above or below that average for a party.

44. To determine whether a particular incumbent was likely to be re- elected, Dr. Lublin also looked at the districting plan that was in effect throughout the 1990s. For those incumbents who have historically won in districts that lean against the incumbent's party, Dr. Lublin assumed they

would continue to win if the district did not change very much. Tr. at 55:19- 56:12 (Lublin).

45. Petitioners also presented the testimony of Mr. Larry Ceisler, a political consultant and expert in Pennsylvania politics. Mr. Ceisler used his experience and knowledge of Pennsylvania and past elections to explain the likely impact of Act 1 as well as the impetus behind its passage. Tr. at 157:15-160:22, 165-03-04, 165:19-167:22, 168:08-19, 170:24-171:23; 173:24-174:15, 175:17-176:10, 176:20-177:12, 192:07-11 (Ceisler).

The Effect of Act 1 on Party Membership on the Congressional Delegation

46. Act 1, the congressional redistricting plan passed by the General Assembly in January 2002 and signed into law by the Governor, creates only five or six districts that Democrats are likely to win out of 19, giving Republicans a 13-6 or 14-5 likely advantage in the Pennsylvania congressional delegation - even if they receive less than half the votes cast, in which case there is a reasonable likelihood that Republican candidates will be able to prevail in 2002 and beyond.[6]

47. Act 1 pairs two incumbent Democratic Congressmen into District 13, Congressmen Hoeffel and Borski. Exh. 7; Tr. at 18:14-18:16 (Hoeffel). Congressman Hoeffel testified that it is highly probable that Congressman Borski would defeat him in the Democratic primary but he would lose the general

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[6] Paragraph 46 reflects the amended finding of fact submitted by Judge Pellegrini. The amendment deleted a typographical error in the original submission of his findings of fact.

election to a moderate Republican from the Montgomery County portion of District 13. About 53 percent of the 13th District's population live in Montgomery County and about 47 percent live in Philadelphia. Tr. at 19:7- 19:19 (Hoeffel). Indeed, Melissa Brown, a Republican from Montgomery County, has already announced her intention to run. Tr. at 19:20-20:13 (Hoeffel). Brown, who is pro-choice, would likely defeat the pro-life Congressman Borski. Tr. at 166:07-167:22 (Ceisler).

48. Under Act 1, Congressman Holden, a Democrat, who is paired in the 17th District with Congressman Gekas, a Republican, is likely to be defeated in a seat that strongly favors the Republican. Exh. 6; Tr. at 21:15-21:18 (Hoeffel). Act 1 also pairs Democratic Congressmen Doyle and Coyne; Coyne has indicated he will retire.

49. Congressman Mascara is not paired with an incumbent, but Act 1 places him in a radically reconfigured district which heavily favors a specific Republican challenger - State Senator Tim Murphy. Tr. at 97:24-99:09, 109:15-23 (Mascara).

50. Act 1 congressional districts have wide disparities in the proportion of constituents that Democratic and Republican incumbents retain from their old districts.

51. The congressional districts drawn by Act 1 was for the purpose and intent to elect more Republican members to Congress than Democrats. See, e.g., Exhs. 6, 39, 40, 48, 50; Tr. at 53:10-15, 64:14-68:10 (Lublin); 165:03-04 (Ceisler).

District Lines

52. Under Act 1, lines were drawn using census tracts rather than precincts, i.e., voting or election districts. Act 1 splits six election precincts or voting districts into multiple congressional districts, doubling the number of precinct splits in the 1992 plan. Act 1; Exh. 56 at 25, 28.

53. Act 1's District 6 is an irregular, "dragon-shaped" district that covers three counties in southeast Pennsylvania and includes several wholly distinct, unconnected communities of interest. Exh. 7; Tr. at 16:9-16:24 (Hoeffel). District 6 is centered in rural Chester County, extends deeply into Berks County, and then comes into Montgomery County at Limerick Township just below Pottstown, includes the borough of Pottstown itself, swings to the east and then down towards the south through the center of Montgomery County to pick up the county seat of Norristown and Lower Merion Township. Exh. 7; Tr. at 16:9-16:24 (Hoeffel). In so doing, District 6 combines the relatively unrelated rural parts of Chester and Berks County with the "densely settled suburban" communities of Norristown, Plymouth, Lower Merion and Narberth in Montgomery County. Exh. 7; Tr. at 16:18- 16:24 (Hoeffel).

54. Act 1 divides up western Pennsylvania as can best be seen by the jagged and irregular line between Districts 12 and 18.

55. Act 1's districts are significantly less compact than under prior plans in Pennsylvania. Professor Lublin analyzed compactness using two separate measures - "Perimeter Measure" and "Dispersion Measure" - that are generally accepted in Professor Lublin's field and widely used in

redistricting cases. Exh. 42; Tr. at 78:12-78:15 (Lublin). Using Professor Lublin's "Perimeter Measure Analysis," four of Act 1's districts - Districts 1, 6, 12 and 18, are less compact than the least compact district under the 1992 plan. Exh. 42. On average, Act 1's districts are less compact than those in prior decades. Exh. 42; Tr. at 80:1-5 (Lublin).

56. Act 1 divides 65 municipalities in comparison with only 13 municipal splits in the 1992-2001 map, a fivefold increase. Tr. at 177:04-12 (Ceisler). Petitioners' Alternate Plans 1 and 2 split only 18 municipalities. Tr. at 177:04-19 (Ceisler). District 12 by itself splits more than 20 townships. Exh. 6. Act 1 also splits 25 counties into multiple districts, up from 18 county splits under the 1992 plan. Exh. 6; Exh. 56, at 25-27.

As the U.S. Supreme Court observed, "the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process." *Bandemer, 478 U.S. at 132-33.* The record reveals that the answer is yes. If the record of this case does not establish unconstitutional political gerrymandering, no such claim exists. This Court should not then waste its valuable judicial resources entertaining illusory claims that, in reality, can never be established.

Thus, I dissent.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH,
NORMA JEAN VIETH, and SUSAN FUREY,
Plaintiffs,
v.
THE COMMONWEALTH OF PENNSYLVANIA;
MARK S. SCHWEIKER, et al
Defendants.

No. 1: CV 01-2439
Judge Rambo, Judge Yohn, Judge Nygaard

NOTICE OF APPEAL OF PLAINTIFFS RICHARD VIETH, NORMA JEAN VIETH, AND SUSAN FUREY

Plaintiffs Richard Vieth, Norma Jean Vieth, and Susan Furey hereby appeal to the Supreme Court of the United States from the Order entered in this matter on February 22, 2002 dismissing Plaintiffs' Amended Complaint For Declaratory And Injunctive Relief insofar as it raised claims of impermissible partisan gerrymandering. This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

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Vieth, and Susan Furey

Dated: April 23, 2002

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,
Plaintiffs,
v.

THE COMMONWEALTH OF PENNSYLVANIA; MARK S. SCHWEIKER, in his official capacity as Governor of Pennsylvania; KIM PIZZINGRILLI, in her official capacity as Secretary of the Commonwealth of Pennsylvania; RICHARD FILLING, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State; ROBERT C. JUBELIRER, in his official capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate; MATTHEW J. RYAN, in his official capacity as Speaker of the Pennsylvania House of Representatives,
Defendants.

NO. 3:CV-01-2439

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. The plaintiffs have brought this action to enforce voting rights guaranteed to them by the United States Constitution. As registered Democrats and voters in the Commonwealth of Pennsylvania, the plaintiffs have exercised, and wish to continue exercising, their right to vote

for their preferred candidates for United States Representative, both in general elections and in Democratic Party primary elections. The congressional districting plan that the Pennsylvania General Assembly imposed on the Commonwealth on January 3, 2002, however, violates plaintiffs' rights under the United States Constitution.

PARTIES

2. Plaintiff Richard Vieth is a registered Democrat and under the new districting plans resides in District 16. He resides at 632 Laurel Lane, Lancaster, Pennsylvania 17601.

3. Plaintiff Norma Jean Vieth is a registered Democrat and under the new districting plans resides in District 16. She resides at 632 Laurel Lane, Lancaster, Pennsylvania 17601.

4. Plaintiff Susan Furey is a registered Democrat and a resident of Montgomery County. She resides at 507 Bryn Mawr Avenue, Bala Cynwyd, Pennsylvania, 19004. Under the districting plan established in 1992, Furey resided in District 13. Under the new districting plan, Furey resides in District 6, which is overpopulated and non-compact.

5. Defendants are the Commonwealth of Pennsylvania and officials thereof who have duties and responsibilities under the laws of the Commonwealth to redraw congressional districts in Pennsylvania following the release of population data from each federal decennial census and then to conduct elections in those districts. Defendant Mark S. Schweiker is the Governor of Pennsylvania. Defendant Kim Pizzingrilli is the Secretary of the Commonwealth and oversees Pennsylvania's electoral process. Defendant Richard Filling is the Commissioner of the Bureau of Commissions, Elections, and Legislation of

the Pennsylvania Department of State, which is charged with administering functions related to Pennsylvania's electoral process. Defendant Robert C. Jubelirer is the Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate. Defendant Matthew J. Ryan is the Speaker of the Pennsylvania House of Representatives.

JURISDICTION AND VENUE

6. This Court has exclusive jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202, and 2284. Venue is proper in this district under 28 U.S.C. § 1391(b).

RELEVANT STATE AND FEDERAL CONSTITUTIONAL PROVISIONS

7. Section 2 of Article I of the United States Constitution, as amended by Section 2 of the Fourteenth Amendment, provides, in part, that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States" and that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . ."

8. Section 4 of Article I of the United States Constitution grants limited authority to the Legislature of each State to determine "[t]he Times, Places and Manner of holding elections for . . . Representatives." As the Supreme Court of the United States has recognized, State Legislatures are more limited in their authority to draw congressional districts than they are under their inherent power to draw their own state legislative districts.

9. In the First Amendment to the Bill of Rights, the United States Constitution protects the rights of freedom of speech and association.

10. The Equal Protection Clause of Section 1 of the Fourteenth Amendment prohibits any State from "deny[ing] to any person within its jurisdiction the equal protection of the laws."

11. The Privileges and Immunities Clause of Section 1 of the Fourteenth Amendment prohibits any State from "abridg[ing] the privileges or immunities of citizens of the United States."

12. Together these constitutional provisions embody fundamental guarantees that every citizen, regardless of race or political party, will have a fair and equal opportunity to cast a meaningful ballot for members of Congress and a fair and meaningful opportunity to be represented by a person of their choice in the United States Congress. These guarantees include, among other things, the one-person, one-vote principle – requiring each of a State's congressional districts to contain the same number of persons, absent a legitimate justification – and the prohibition against invidious partisan gerrymanders, which operate to consistently degrade the votes of a particular disfavored group.

THE 1992 CONGRESSIONAL PLAN AND THE 2000 CENSUS

13. In March 1992, the Supreme Court of Pennsylvania ordered into effect a congressional districting plan establishing Pennsylvania's 21 current congressional districts. Although that plan did not achieve perfect population equality among the districts, the Supreme Court ruled that slight deviations in population can be justified when the deviations are necessary to protect other important districting interests such as the preservation of local municipal boundaries. The plan that the Supreme Court ordered into effect split 27 localities (including 19 counties

and 8 cities, towns, and boroughs) and 3 election precincts; the Supreme Court rejected a competing plan that had a smaller population deviation on the grounds that it split 48 localities (including 21 counties and 27 cities, towns, and boroughs) and 22 election precincts. *See Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992). The Pennsylvania Supreme Court also found that the plan they adopted was fair to both major political parties.

14. After the Supreme Court ordered the 1992 plan into effect, a three-judge federal court reviewed its validity. The three-judge court ruled that the Pennsylvania Supreme Court's plan was valid, and in interpreting *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), recognized that, "the Pennsylvania Supreme Court identified in its opinion the avoidance of municipal splits as an important public policy of the Commonwealth." The Court wrote, "This conclusion is a matter of Pennsylvania state law and we are bound by it." *Nerch v. Mitchell*, No. 92-0095, slip op. at 32 - 33 (M.D. Pa. Aug. 13, 1992) (per curiam).

15. Under the 1992 Plan, which was used for the most recent congressional elections in November 2000, citizens of the Commonwealth of Pennsylvania cast almost an identical number of votes for Democratic candidates as for Republican candidates, and elected 11 Republicans and 10 Democrats to Congress.

16. The 2000 election was the last under the 1992 plan drawn by the Pennsylvania Supreme Court. On December 28, 2000, the Secretary of Commerce reported to the President of the United States the tabulation of population for each of the fifty States, including the defendant Commonwealth of Pennsylvania, as determined in the 2000 decennial census. Those population figures showed that Pennsylvania is now entitled to only 19 Representatives

in Congress – a decrease of two Representatives since the 1990 census. The census data also show that Pennsylvania's resident population as of April 1, 2000, was 12,281,054 persons -- 646,371 or 646,372 persons for each of the 19 congressional districts.

17. During its regular session in 2001, the General Assembly was unable to reach agreement on a congressional redistricting plan. The State House of Representatives passed one plan and the State Senate passed a different plan. The General Assembly adjourned on December 13, 2001, at an impasse.

18. Before and after the deadlock, national Republican leaders sought to use the Pennsylvania congressional redistricting process, which was wholly controlled by the Republican General Assembly and Republican governor, to achieve national political ends, rather than to reach a result in the interests of the people in Pennsylvania. National Republican leaders pressured Pennsylvania legislators to push for maximum partisan advantage, regardless of the cost. Karl Rove, a political advisor to President George W. Bush – who lost in Pennsylvania – asked state Republicans to favor the plan passed by the state Senate rather than the more moderate House plan. Rep. Thomas M. Davis III, a Republican of Virginia and the chairperson of the National Republican Congressional Committee, stated publicly that Pennsylvania would serve as a payback for whatever redistricting successes Democrats might have had elsewhere. "Democrats rewrote the book when they did Georgia, and we would be stupid not to reciprocate," he said. Pennsylvania "will make Georgia look like a picnic." Press accounts report that Pennsylvania House Majority Leader John Perzel also received phone calls from Republican Sen. Rick

Santorum and House Speaker Dennis Hastert regarding the importance of maximizing the number of seats that would elect Republicans and thus rigging the districts against the Democratic party and the interests of Democratic voters.

THE NEW CONGRESSIONAL PLAN

19. Following the end of the General Assembly's regular session, Republicans from the House and Senate worked to reach agreement on a plan that would satisfy the interests of their Republican colleagues and the national Republican party. At all points, Democratic state legislators, including those on the Conference Committee, were shut out of this process. Democratic leaders in the House and Senate were presented, for the first time, with a final version of a proposed congressional redistricting plan on the morning of the conference committee on January 2, 2002. The Democratic members of the Conference Committee had no input whatsoever on the final plan. The Conference Committee voted this plan out on straight party lines.

20. On January 3, 2002, the General Assembly passed the new congressional redistricting plan, Senate Bill 1200 (SB1200). That plan, delineating 19 congressional districts to comport with reapportionment following the 2000 Census, not only fails to equalize the population of each congressional district, but also ignores all traditional redistricting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage.

21. Under SB 1200, the Commonwealth's most populated district, District 7, would have a population of 646,380. The Commonwealth's least populated districts, Districts 1, 2, and 17, would each have populations of 646,361. This creates a total population deviation of 19, which is lower than the total population deviation in the

1992 plan, but in contrast to the 1992 plan, the new plan's deviation serves no recognizable legitimate interest: rather than protecting municipal boundaries, the plan splits units of local governments throughout the state among multiple districts. SB 1200 splits 84 local governments, including 25 counties and 59 cities, boroughs, or townships, as well as 41 wards. (To avoid double counting, Philadelphia for these purposes has been treated as a county, not as both a county and a city.) Montgomery County alone is split into six different congressional districts. This is in sharp contrast with the plan drawn by the Pennsylvania Supreme Court in 1992, which recognized the importance of preserving local government boundaries and split only 19 counties and 8 cities, townships, and boroughs.

22. SB 1200 also ignores all other traditional redistricting criteria, thus demonstrating that partisanship – and nothing else – was the rationale behind the plan. Rather than protecting communities of interest, it fractures them, substituting meandering and irregular lines through the state. District 6, for example, looms like a dragon descending on Philadelphia from the west, splitting up towns and communities throughout Montgomery and Berks Counties. District 7 is barely contiguous. District 8 includes an ungainly gash that at one point narrows to 300 yards and extends five and a half miles into Montgomery County, nearly splitting neighboring District 13 in two. District 12 snakes through several counties, leaving no fewer than 25 split cities, towns, and boroughs. Not surprisingly, the districts in SB 1200 are far less compact than those in the 1992 plan.

23. In constructing SB1200, the General Assembly did not attempt to preserve the cores of existing districts (which minimizes voter confusion by displacing

fewer voters from their current districts), protect incumbents, establish partisan balance, or advance any of the legitimate redistricting criteria recognized by the United States Supreme Court or by scholars in the field of redistricting. Rather, the General Assembly's purpose and intent in enacting SB 1200 was to maximize the representation of Republican interests and minimize the representation of Democrats, no matter what the cost. Indeed, rather than preserving the seniority and power of the Pennsylvania congressional delegation, thereby enhancing Pennsylvania's clout in Washington, the General Assembly sought to replace Democratic members who have seniority with first-term Republicans. As Republicans in the General Assembly have explained, rigging the electoral system in favor of Republicans will advance the policy agenda of current President Bush, which they believe should be in the interests of all residents of the Commonwealth – regardless of the fact that a majority of citizens voted against President Bush.

PARTISAN IMPACT OF SB 1200

24. The partisan effects of SB 1200 are massive. As Democratic state legislators have explained, SB 1200 is a "massacre." SB 1200 ensures that the voting preferences of the residents of Pennsylvania will *not* be reflected in congressional elections and consistently degrades the votes of Democratic voters in the Commonwealth.

25. In terms of voter preferences, the two major political parties hold nearly equal support among Pennsylvania residents, with a slight preference for Democrats. Registered Democrats outnumber registered Republicans 3,733,739 to 3,233,171, a division between the two major parties of 53.6% to 46.4%.

26. Further, on neutral playing fields free from partisan gerrymandering, Democrats consistently perform

competitively in Pennsylvania elections. In twenty-one congressional races during the 2000 elections, the aggregate vote for Democrats was 2,279,227, or 50.6%, while the aggregate vote for Republicans was 2,229,057, or 49.4% of the major parties' vote totals.

27. Democrats also received more total votes than Republicans in the five statewide races in 2000, as Democrats received 11,495,041 votes to Republicans' 11,428,698, a margin of 50.1% to 49.9%. (The vote totals in those elections include the race for President, with Democrat Al Gore receiving 2,485,967 votes (50.6% of all votes cast) to Republican George Bush's 2,281,127 votes (46.4%); the race for Attorney General, in which incumbent Republican Mike Fisher received 2,495,253 votes (55.6% of votes for major party candidates) and Democrat Jim Eisenhower received 1,991,144 votes (44.4%); the race for Auditor General, in which incumbent Democrat Bob Casey, Jr. received 2,651,551 votes (58.7% of votes for major party candidates) and Republican Katie True received 1,862,934 votes (41.3%); the race for State Treasurer, in which the incumbent Republican Barbara Hafer received 2,307,422 votes (51.1% of votes for major party candidates) to Democrat Catherine Knoll Baker's 2,211,471 votes (48.9%); and the race for United States Senator, in which incumbent Republican Rick Santorum received 2,481,962 votes (53.5% of votes for major party candidates) to Democrat Ron Klink's 2,154,908 votes (46.5%).)

28. The new plan will have serious consequences on the Pennsylvania congressional delegation's ability to represent the preferences of Pennsylvania voters. Despite the Commonwealth's 50/50 split between Democrats and Republicans – or, more accurately, its slight preference for Democrats – the new plan will likely result in a

congressional delegation consisting of 13 Republicans and 6 Democrats. Some Republicans have boasted that their majority will be even greater, producing a 14-to-5 edge. Thus, even if they continue, as they have, to receive more than 50% of the vote in congressional elections, Democratic candidates will win less than 1/3 of the seats in Congress; Republicans, receiving less than half of the total votes cast, will receive twice (and almost three times) as many congressional seats.

HARM CAUSED BY SB 1200

29. SB 1200 harms the people of Pennsylvania, particularly Democratic voters, such as plaintiffs, and the Democratic Party, in several distinct ways. First, SB 1200 dilutes the votes of people living in districts that are overpopulated, i.e., contain more than 646,371 people. Those districts include Districts 4, 6, 7, 9, 10, 11, 13, 14, 15, and 19. It does so without any legitimate justification.

30. SB 1200 is also an egregious partisan gerrymander. A partisan gerrymander refers to a district-based election system that rigs a political system in favor of one party. Indeed, Congress has outlawed the use of multi-member districts in drawing congressional districts, 2 U.S.C. § 2(c), precisely because such districts allow a majority party in the state legislature to rig the congressional elections in their favor. A partisan gerrymander does precisely the same thing.

31. By "packing" voters of one party in some districts and "cracking" or fragmenting them in others, a partisan gerrymander ensures that one party wins more representation than its voting strength would otherwise allow. It thus dilutes the voting strength of voters of the other party. The effect of a partisan gerrymander is often referred to as bias – the lines are drawn in such a way as to

favor (to be biased toward) one party, which is able to win more representation with fewer votes.

32. SB 1200 is a massive political gerrymander. It packs and fragments Democratic voters to ensure that their votes are worth less than Republican votes. Thus, although Pennsylvania is a 50/50 state, SB 1200 was designed to ensure that Republicans would win at least 13 of the 19 congressional seats. In terms of bias, SB 1200 gives Republicans a bias of over 18% – for less than 50% of the votes, they receive at least 68% of the seats in Congress. The plan does not merely fail to apportion seats proportionally; it maximizes the Republicans' partisan advantage to the exclusion of all other criteria. In terms of magnitude, SB 1200 is one of the most egregious partisan gerrymanders in recent history. It is significantly worse than that challenged in *Davis v. Bandemer*, 478 U.S. 109 (1986), in which the Supreme Court recognized the justiciability of partisan gerrymandering. It gives one party a two- or three-to-one advantage based on nothing other than the packing and cracking of voters.

33. This bias will not apply in simply one political election, but will affect every future election under SB 1200, regardless of the political conditions. It cements Republican power and effectively reduces Democrats to being a small minority of the Commonwealth's congressional delegation for the coming election and likely the coming decade.

34. By diluting the voting strength of Democratic voters, SB 1200 operates to minimize or cancel out the votes of Democrats, solely because the dominant party in the State Legislature does not like their political point of view and how they vote. SB 1200 consistently and systematically degrades the influence of Democratic voters on the political

process as a whole, denies them fair representation, and penalizes Democratic voters for their views. Given that Democratic voters make up a small majority of the voters in Pennsylvania, SB 1200 will frustrate the will of the majority to influence the political process.

35. The harms caused by SB 1200 go well beyond the statewide dilution of Democratic voting strength. SB 1200 dramatically affects the Democratic Party's prospects for success in congressional elections in Pennsylvania in other ways and will operate to reduce the choices that voters, and particularly Democratic voters, will have in Pennsylvania elections. Political success depends on a variety of factors, including party organizing, recruitment of viable candidates, fund-raising, and voter turnout efforts. These factors, in turn, depend in large part on the party's potential for success. Because of the bias created by SB 1200, the Democratic Party will have greater difficulty in fielding competitive candidates. Further, those candidates who do run will find it more difficult to raise the money necessary to compete effectively, because potential donors will be hesitant to support losing candidates.

36. By locking down control of the congressional delegation, Republicans have leveraged their control over other aspects of the Pennsylvania political structure to essentially shut Democrats and Democratic voters out of the political process. Republicans already control the General Assembly and the Governor's office; SB 1200 itself is evidence that they will use that political power to minimize the voice of Democratic voters so that they might advance the Republican agenda in Pennsylvania and in national politics. SB 1200 installs the Republican Party as the dominant party in Pennsylvania – based solely on bias and unfairness, not on votes.

37. Democratic voters, such as plaintiffs, will also suffer harm due to the impact of SB 1200 on representation of Pennsylvania voters. The fact that 13 or 14 districts are now designated as "Republican districts" means that Pennsylvania Democrats – who compose a majority of the state – will now be increasingly represented by members of Congress who do not represent their views. As with race, when a district – indeed an entire state's redistricting plan is obviously created solely to effectuate the interests of one political group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than the constituency as a whole. Indeed, the presumption that a winning candidate represents all of the district's constituents is not as strong here as it is in the case of a racial gerrymander, where there is no necessary connection between a voter's or candidate's race and his or her political views. In a partisan case, the presumption no longer holds, because the connection between one's partisan affiliation and his or her political views is much closer than the connection between a voter's race and his or her political views. Even those voters whose political views do not perfectly correlate with their representatives' views are better represented by a representative of their own political party than one of another party. Although representatives may still be responsive to the interests of independent voters whose vote they may aim to capture, they are non-responsive to – and can entirely ignore – voters who support the opposing party.

38. SB 1200 also harms plaintiffs and other Democratic voters in Pennsylvania because it clearly and improperly draws distinctions and doles out benefits on the basis of political party. Unlike a redistricting plan that seeks to balance partisan success between the two parties or one which takes politics into account, SB 1200 creates favored

and disfavored groups, and sends a clear message to the people of Pennsylvania – electing Republicans is more important than the will of the majority and Democrats are to be penalized because their views are not favored by the majority in the General Assembly. By relying exclusively on a principle of maximum partisan advantage, the General Assembly's plan thus classifies and discriminates against voters solely because of their party affiliations. Plaintiffs' ability to associate with other Democratic voters to support their candidate of choice has been uniquely harmed, not by any accident of geography, but by an intentional effort to degrade a class of voters' ability to influence the political process.

39. SB 1200 also harms Democratic voters in the Commonwealth because it is, on its face and intentionally, legislation that exults Republican advantage over any legitimate criterion for governmental decisionmaking. Classifications based on political affiliation, like those based on race, are ordinarily impermissible, but the Supreme Court has indicated that such classifications may be permitted when drawing districts. In the line of cases that started with *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court recognized that even a factor that might otherwise be permissible can render a plan unconstitutional when used to the exclusion of all other criteria. The problem is not that the General Assembly considered politics, but that it subordinated – indeed ignored – all traditional redistricting principles and all legitimate bases for governmental decisionmaking, in order to favor those with one political viewpoint over another, thus implicating fundamental rights protected by the U.S. and Pennsylvania Constitutions. SB 1200 is so irregular on its face that it rationally can be viewed only as an effort to segregate voters to advance the interests of one political party, without regard for traditional

redistricting principles and without any legitimate or compelling justification.

40. The very fact that the General Assembly has subordinated all legitimate criteria to political preference is itself a violation of the Equal Protection Clause. While politics will always plan an important role in redistricting, this was not politics as usual. The General Assembly's plan has exceeded ordinary politics, and thus requires judicial intervention. It will impose serious handicaps on Pennsylvania Democrats' efforts to participate in the political process and leaves Pennsylvania Democrats shut out of the congressional electoral process.

CLAIM I

41. Plaintiffs incorporate by reference Paragraphs 1 through 40.

42. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to vote for their Representative to the United States Congress, in violation of Section 2 of Article I of the United States Constitution, as amended by Section 2 of the Fourteenth Amendment, and Section 4, Article I of the United States Constitution.

CLAIM II

43. Plaintiffs incorporate by reference Paragraphs 1 through 42.

44. The facts herein alleged constitute a denial to the plaintiffs of the equal protection of the laws as guaranteed to them by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM III

45. Plaintiffs incorporate by reference Paragraphs 1 through 44.

46. The facts herein alleged constitute an abridgement of the privileges and immunities of citizenship guaranteed to the plaintiffs by the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

CLAIM IV

47. Plaintiffs incorporate by reference Paragraphs 1 through 46.

48. The facts herein alleged constitute a denial or abridgement of the plaintiffs' right to free association as guaranteed to them by the First Amendment to the United States Constitution.

CLAIM V

49. Plaintiffs incorporate by reference Paragraphs 1 through 48.

50. The facts herein alleged constitute a violation of Section 1983 of Title 42 of the United States Code.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Assume jurisdiction of this matter and convene as a three-judge District Court pursuant to Section 2284 of Title 28 of the United States Code;

B. Enter a declaratory judgment that the congressional districting plan that the General Assembly passed on January 3, 2002 violates plaintiffs' rights under the aforesaid provisions of the United States Constitution and federal law;

C. Enjoin permanently the defendants, their officers, agents, employees, attorneys, successors in office, from conducting primary or general elections, by themselves or in concert with other persons, using the January 3, 2002 General Assembly congressional districting plan or any other congressional districting plan that violates the United States Constitution or federal law;

D. Impose by Court order a new congressional redistricting plan that meets the requirements of the United States Constitution and federal law that will be in effect for the 2002 elections and enjoin the defendants from enacting or implementing a new redistricting plan until the 2004 elections;

E. Grant plaintiffs their reasonable attorneys' fees, litigation expenses, and court costs; and

F. Grant plaintiffs any other relief that the Court finds appropriate and equitable.

Respectfully submitted,

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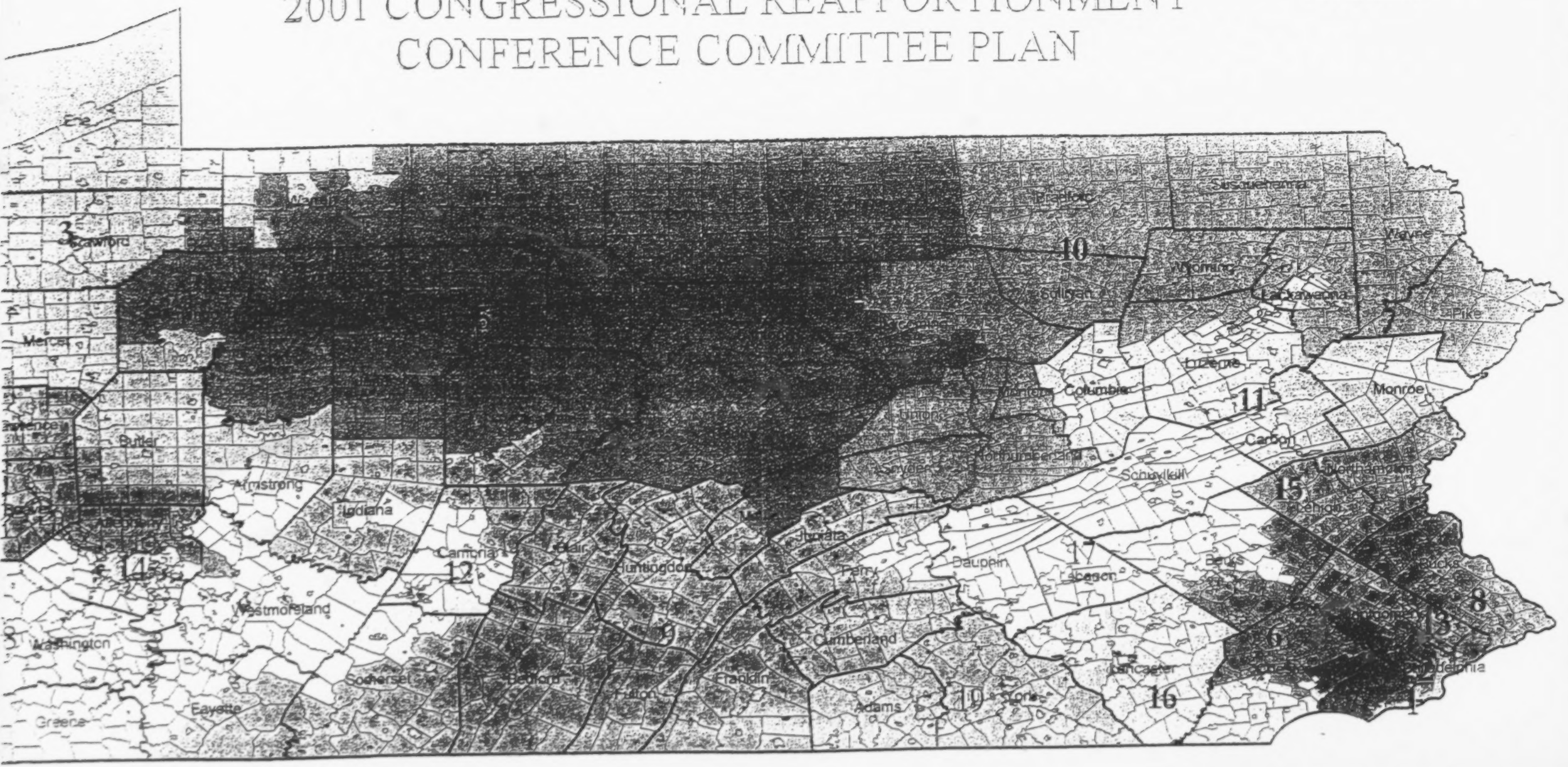
Dated: January 11, 2002

APPENDIX F

2001 CONGRESSIONAL REAPPORTIONMENT CONFERENCE COMMITTEE PLAN



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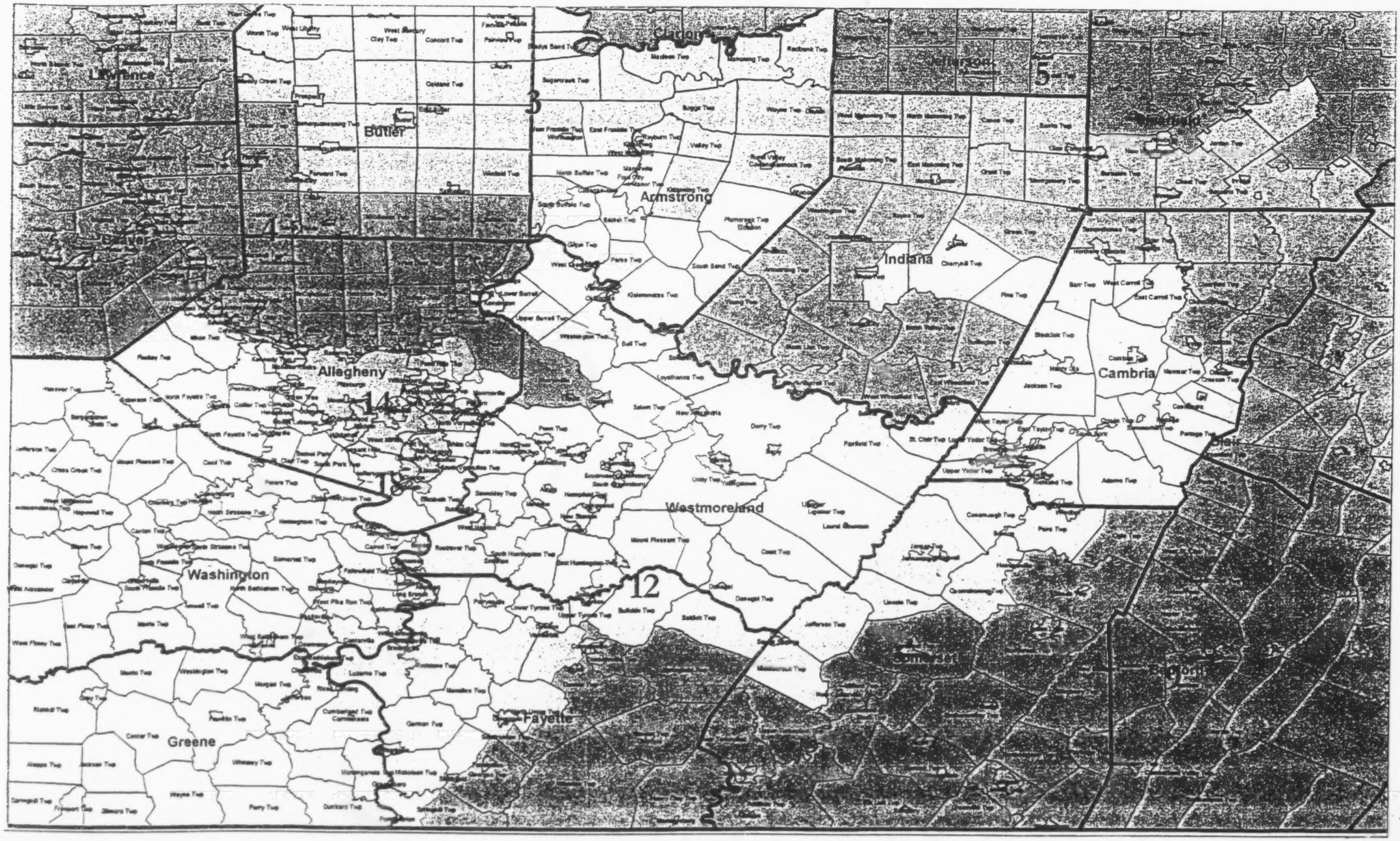
APPENDIX G

U. S. Congressional Districts - Southeast - Conference Committee

APPENDIX H

12TH & 18TH CONGRESSIONAL DISTRICT--CONFERENCE COMMITTEE



Supreme Court, U.S.
FILED
JUL 24 2002
CLERK

(2)

No. 01-1873

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

RICHARD VIETH, et al. *Appellants*

v.

ROBERT C. JUBELIRER AND MATTHEW J. RYAN, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

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JULY 24, 2002

2889

QUESTIONS PRESENTED

1. Does this Court lack jurisdiction under 28 U.S.C. §1253 to review an interlocutory order of a three-judge court dismissing some but not all claims in a five-count complaint challenging a state law for congressional redistricting?

2. Should a three-judge court's dismissal of a claim for partisan gerrymandering for failure to allege facts sufficient to establish the "actual discriminatory effect" required by *Davis v. Bandemer*, 478 U.S. 109 (1986), be summarily affirmed, when it is consistent with the decision in *Bandemer* and with the decisions of other three-judge courts, many of which have been summarily affirmed by this Court?

3. Is a claim that a state law for congressional redistricting will elect a disproportionate number of representatives from one political party non-cognizable under U.S. CONST. art. I, §4?

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Unofficial 2001 Municipal Election Results, PA. Dept. of State, (Supreme, Superior & Commonwealth Courts) (http://web.dos.state.pa.us/elections/elec_results/dsf/elec_menu.cgi?eyear=2001&etype=M) 3

PA Senate Bill 1200 2

No. 01-1873

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

RICHARD VIETH, et al. *Appellants*

v.

ROBERT C. JUBELIRER AND MATTHEW J. RYAN, et al.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 18.6, Robert C. Jubelirer, Lieutenant Governor and President *Pro Tempore* of the Senate of the Commonwealth of Pennsylvania and Matthew J. Ryan, Speaker of the House of Representatives of the Commonwealth of Pennsylvania ("Presiding Officers") (Appellees herein and Defendants below), move to dismiss the present appeal for lack of jurisdiction or, in the alternative, to affirm the order below because the questions presented by Appellants for review are so insubstantial as to require no further briefing or oral argument.

Pursuant to Supreme Court Rule 18.4, Presiding Officers have also filed a Jurisdictional Statement in support of their conditional cross-appeal from the order at issue herein. Should the Court determine that appellate jurisdiction is appropriate and require briefing and argument in the present appeal, Presiding Officers request that their cross-appeal from the same order be consolidated and that briefing and argument be allowed on the questions presented therein.

STATEMENT OF THE CASE

A. Facts Relevant to this Motion

As a result of reapportionment following the 2000 Census, the Commonwealth of Pennsylvania lost two seats in Congress, going from 21 to 19. On January 7, 2002, a new state law ("Act 1") established district boundaries for the Commonwealth's 19 congressional seats.[1]

When the Pennsylvania General Assembly recessed on December 13, 2001, different versions of the new redistricting plan (SB 1200) had been passed by the Pennsylvania Senate and the Pennsylvania House. SB 1200 was then considered by a Conference Committee, which reported a new version to the Senate and House. The final vote in the Senate on SB 1200 was 28-22; the final vote in the House was 132-59. Forty-two members of the House Democrat Caucus voted in favor of the bill, which would not have had a majority for passage without such bi-partisan support.

Based on unofficial November 2001 voter registration data, there are 3,733,739 registered Democrats; 3,233,171 registered Republicans; 3,266 registered Green

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[1] The previous congressional redistricting plan for the Commonwealth was drawn in 1992 by the Supreme Court of Pennsylvania.

party members and 803,365 other registered voters in Pennsylvania. *See* Am. Compl. ¶25; App. at 124a; *see also* Unofficial Voter Registration Data Nov. 2001, PA Dept. of State (http://www.dos.state.pa.us/bcel/arc/elec_arc.html). Using these data, Democrats account for 48%, Republicans account for 41.6% and others account for 10.3% of the registered voters. No party has a majority.

In the 2000 general election, 11 Republicans and 10 Democrats were elected to Congress. Am. Compl. ¶15; App. at 120a. In the five statewide elections held in 2000, Republicans won 3 races (U.S. Senator, Attorney General and State Treasurer) and Democrats won 2 races (President and Auditor General). Am. Compl. ¶27; App. at 125a.[2]

B. Procedural History and Decision Below

The February 22, 2002 opinion and order at issue in the present appeal were entered in response to motions to dismiss filed by Presiding Officers and Executive Officers pursuant to Fed. R. Civ. P. 12(b)(1) and (6). The three-

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[2] In Am. Compl. ¶27, other than for President, Plaintiffs allege the percent of the vote won by Republican and Democrat candidates based only on the totals for those two parties' candidates: U.S. Senator (53.5% R, 46.5% D); Attorney General (55.6%R, 44.4% D); Auditor General (41.3% R, 58.7% D); State Treasurer (51.1% R, 48.9% D). App. at 125a. These figures exclude votes for other candidates.

In 2001, the Republican candidates won all 7 statewide elections for Supreme, Superior and Commonwealth Court. The Republican candidate for Supreme Court received 52.7% of all votes cast; the three Republican candidates for Superior Court received 55% of all votes cast; and the three Republican candidates for Commonwealth Court received 57% of all votes cast. *See* Unofficial 2001 Municipal Election Results, PA. Dept. of State (Supreme, Superior & Commonwealth Courts) (http://web.dos.state.pa.us/elections/elec_results/dsf/elec_menu.cgi?eyear=2001&etype=M).

judge court did not dispose of all five claims in the Amended Complaint. While it dismissed Claim II (alleging partisan gerrymandering in violation of the Equal Protection Clause), the court declined to dismiss Claim I (alleging a violation of the principle of one-person, one-vote) for failure to state a claim.

To state a claim for partisan gerrymandering under the plurality decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), a plaintiff must allege "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 127 (citing *Mobile v. Bolden*, 446 U.S. 55, 67-68 (1980)). In their Jurisdictional Statement, Appellants provide a misleadingly simplified discussion of the three-judge court's analysis of the issue of discriminatory effects and inaccurately suggest that the three-judge court decision in *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989), as opposed to this Court's decision in *Bandemer*, provided the basis for the lower court's reasoning and determination to dismiss Claim II.

Contrary to Appellants' suggestion, the court below began its analysis by noting that while *Bandemer* "offers little concrete guidance" as to the issue of discriminatory effects, the result in that case, understood in terms of the evidence presented, could be drawn upon for aid. The court also examined the decision in *Badham*, noting that it had been summarily affirmed by this Court. 188 F. Supp.2d at 454, n.12; App. at 23a. Then, drawing on both its understanding of *Bandemer* and the analysis set forth in *Badham*, the three-judge court summarized the allegations before it:

> In this case, Plaintiffs' allegations amount to this: Act 1 is rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans. As a result, Democrats will have a more difficult time electing

> their candidates. Due to this impediment, 'the Democratic Party will have greater difficulty in fielding competitive candidates.' Thus, Act 1 operates 'to essentially shut Democrats and Democratic voters out of the political process.' Plaintiffs, in particular, 'will suffer harm ... [because they] will now be increasingly represented by members of Congress who do not represent their views.'

188 F. Supp.2d at 546; App. at 25a (internal citations omitted; brackets in the original). The court then proceeded to reject these allegations as insufficient to allege the required discriminatory effects under *Bandemer*.

First, the three-judge court characterized the allegations as amounting to nothing more than a plea for proportional representation which "*Bandemer* soundly rejected [as] a basis for an equal protection violation." *Id.*; App. at 25a. Second, since *Bandemer* had explicitly rejected the assumption that voters who vote for a losing candidate will not be adequately represented by the winning candidate, Plaintiffs' allegation that, as Democrats, they will be represented in Congress by Republicans who do not share their views, was irrelevant. *Id.*; App. at 26a. Third, focusing on the relevant group – i.e., Pennsylvania Democrat voters, *not* the Democrat party – the court explained: "Stripped to its bones, Plaintiffs' allegations, in this respect, amount to a claim that Act 1 will make it more difficult for them to elect Democratic candidates to Congress. However, this simply is not the end-all be-all constitutional analysis that Plaintiffs make it out to be." *Id.*; App. at 26a. For support, the court quoted the following passage from the *Bandemer* plurality opinion:

> '[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render the scheme

> constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. ... Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.'

188 F. Supp.2d at 546-47 (quoting *Bandemer*, 478 U.S. at 131-32); App. at 26a-27a. Finally, the court noted that Plaintiffs' allegations failed to support their conclusory argument that Act 1 "'essentially shuts Democratic voters out of the political process'" as "there are no allegations that anyone has ever prevented, or will prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern." *Id.* at 547; App. at 27a.

Having found that Plaintiffs failed to meet the threshold discriminatory effects test of *Bandemer*, the three-judge court dismissed Claim II. As noted above, however, it did not dismiss Count I (alleged violation of the one-person, one-vote principle). A hearing was held on the remaining claim and the implementation of Act 1 was enjoined by the order entered April 8, 2002.[3] *See* App. at 45a.

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[3] The propriety of the April 8, 2002 decision is the subject of Appeal Nos. 01-1817 and No. 01-1823. Following the invalidation of Act 1, the Pennsylvania General Assembly passed a bill containing a revised congressional redistricting plan, which, on April 18, 2002, the Governor signed into law as Act No. 2002-34. Act 1 will still be used for this congressional election cycle, but will be superseded by Act 34 for the 2004

ARGUMENT

I. JURISDICTION

In their Jurisdictional Statement, Appellants invoke 28 U.S.C. §1253 as the basis for this Court's jurisdiction. J.S. at 1. That statutory provision, however, does not apply here and the appeal should be dismissed.

Section 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order *granting or denying*, after notice and hearing, *an interlocutory or permanent injunction* in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. §1253 (emphasis added).[4] This statutory provision provides the sole basis for a direct appeal to this Court from a decision of a three-judge court in the context of reapportionment. As a rule, it is to be narrowly construed. *See MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (noting the "historic congressional policy of minimizing the mandatory docket of th[e] Court in the interest of sound judicial administration").

Appellants characterize the dismissal of their partisan gerrymandering claim as the denial of an injunction in order to fit within the narrow confines of Section 1253. *See* J.S. at 1. They simultaneously downplay the significance of two facts about the February

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congressional elections. On April 23, 2002, the three-judge court stayed the injunction imposed by the April 8, 2002 order.

[4] The underlying action was required to be heard by a three-judge court pursuant to 28 U.S.C. §2284(a).

22, 2002 order that are relevant to the jurisdictional analysis: (1) the order did not purport to deny injunctive relief but only to rule on the motions to dismiss then before the court, and (2) the order, while dismissing the partisan gerrymandering claim, left Claim I (alleged violation of the one-person, one vote principle) pending. Thus, at the time the partisan gerrymandering claim was dismissed, injunctive relief against Act 1 was still available, and was, in fact, later granted when the act was invalidated and its implementation was enjoined.

The February 22, 2002 order, which did not explicitly or implicitly deny injunctive relief, can only be described as an "interlocutory" order over which this Court lacks jurisdiction under Section 1253.

In *Goldstein v. Cox*, 396 U.S. 471 (1970), this Court determined that it lacked jurisdiction to review a similar type of interlocutory order. There, the plaintiffs had filed a direct appeal pursuant to Section 1253 from an order entered by a three-judge court denying their motion for summary judgment on the basis that it constituted an order denying an injunction. The Court concluded the order was an interlocutory order and was not appealable because it did not grant or deny a preliminary injunction. *Id.* at 475.

Appellants here, similar to what the plaintiffs in *Goldstein* did, attempt to characterize an interlocutory order as the denial of injunctive relief appealable under section 1253. *See also Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974) (rejecting appellant's theory, under 28 U.S.C. §1253, that dismissal of his complaint for lack of standing was tantamount to denying him permanent injunctive relief). The order, however, did not deny Appellants' request for injunctive relief, which eventually was granted when, on April 8, 2002, the three-judge court enjoined the implementation of Act 1.

Appellants chose not to seek a preliminary injunction, which, whether granted or denied, would have been immediately appealable to this Court under section 1253. Having made that strategic choice, they cannot now assert that an interlocutory order dismissing some but not all their claims was a denial of injunctive relief. The present appeal should be dismissed.[5]

II. INSUBSTANTIAL QUESTIONS PRESENTED

Assuming this Court finds the exercise of appellate jurisdiction under Section 1253 to be appropriate, it should summarily affirm the decision of the three-judge court dismissing Claim II for failure to state a claim.[6]

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[5] At least one court of appeals has interpreted opinions of this Court to suggest that, once the Court assumes appellate jurisdiction of an order granting or denying injunctive relief, it will consider other rulings and orders of the three-judge court below. *See Hays v. State of Louisiana*, 18 F.3d 1319, 1321 n.9 (5th Cir. 1994) (citing *Mitchell v. Donovan*, 398 U.S. 427 (1970) (a direct appeal which includes "only a declaratory judgment " is unreviewable) and *Rockefeller v. Catholic Medical Center of Brooklyn & Queens, Inc.*, 397 U.S. 820 (1970) ("The judgment appealed from does not include an order granting or denying an interlocutory or permanent injunction and is therefore not appealable to this Court under 28 U.S.C. §1253.")). Appellants, here, however, did not file a conditional cross-appeal from the April 8, 2002 order enjoining implementation of Act 1 in conjunction with either Appeal No. 01-1817 or No. 01-1823, and thus the propriety of the February 22, 2002 order is not otherwise before this Court.

[6] As noted above, Presiding Officers have filed a conditional cross-appeal from the February 22, 2002 order in which they raise two issues with respect to the three-judge court's disposition of Claim II – whether the partisan gerrymandering claim is justiciable and whether Plaintiffs successfully alleged the existence of a "politically identifiable group" sufficient to meet the second prong of the *Bandemer* analysis. If this Court notes probable jurisdiction of thisappeal

A. "Discriminatory Effects"

In *Bandemer*, a plurality of the Court set forth the standard for assessing claims of unconstitutional partisan gerrymandering under the Fourteenth Amendment. To state a claim, a plaintiff must allege "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. at 127 (citing *Mobile,* 446 U.S. at 67-68). Unlawful discrimination occurs in this context "only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political system as a whole." 478 U.S. at 132. A "mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination" because an equal protection violation occurs only where "a history of disproportionate results appear[s] in conjunction with strong indicia of lack of political power and the denial of fair representation." *Id.* at 132, 139. This "indicia" requirement was patterned on challenges brought by racial groups to individual multi-member districts, where the racial minorities had "essentially been shut out of the political process." *See id.* at 139.

Appellants' partisan gerrymandering claim faltered under a straightforward application of the strict *Bandemer* "discriminatory effects" test, not from some "construction of *Bandemer* that [] essentially overrule[d] it." *See* J.S. at 15. The fact that partisan gerrymandering claims typically rise or fall on the "discriminatory effects" prong of the analysis *is by design* and derives from the standard set forth by the *Bandemer* plurality itself, and not, as Appellants posit, from some extreme misinterpretation of that standard

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(rather than summarily affirming), Presiding Officers respectfully ask that this Court also consider the questions presented in their conditional cross-appeal.

crafted and followed by the lower courts. *Bandemer* recognized partisan gerrymandering claims as justiciable but purposefully established a difficult standard.

It is evident throughout the plurality decision in *Bandemer* that the requisites for a cause of action were intended to be stringent. Stressing that neither the Constitution nor prior precedent of the Court requires proportional representation of political parties in Congress, the *Bandemer* plurality explained (in language specifically quoted by the three-judge court below) that:

> the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representative of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district ... . Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.

478 U.S. at 131-32 (citing *Mobile*, 446 U.S. at 111 & n.7). The *Bandemer* plurality was unwilling to presume that "those who are elected will disregard the disproportionately underrepresented group." *Id.* at 132. It explained that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will

consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.*

The *Bandemer* plurality both distinguished and analogized between vote dilution in an individual district and statewide, again summarizing the principles that would guide its analysis:

> [A]s in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Id. at 133. The plurality was particularly leery of setting the threshold for a partisan gerrymandering claim too low.

> Inviting attack on minor departures from some supposed norm would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. We decline to take a major step towards that end, which would be so much at odds with our history and experience.

Id. at 133-34.

The plurality recognized the difficulties inherent in the standard they had set: "Determining when an electoral system has been 'arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole' *is of necessity a difficult inquiry*." *Id.* at 143 (internal citations omitted;

emphasis added). Thus, it is evident from the *Bandemer* plurality opinion itself that the requisite discriminatory effects were meant to be difficult to show.

Appellants propose a different standard than every court that has ever applied *Bandemer*. They suggest that unless "redistricting [] achieve[s] a 'level of parity between votes and representation sufficient to ensure ... that majorities are not consigned to minority status,'" illegitimate partisan gerrymandering has occurred. *See* J.S. at 13 (quoting *Bandemer*, 478 U.S. at 126 n.9); *see also* J.S. at 9, 13, 20, and 22 ("under *Bandemer*, a State violates the Equal Protection Clause when, as here, it consigns a political party to one-third or less of the congressional seats, even if that party consistently wins a majority of the vote statewide"). Appellants' "consigning" argument appears to spring from Justice O'Connor's criticism in *Bandemer* that, in finding partisan gerrymandering justiciable, the plurality made an illegitimate policy determination to favor proportional representation. *See* 478 U.S. at 126, n.9. However, it does not appear anywhere in the plurality's discussion of the elements of a partisan gerrymandering claim. Appellants are attempting to merge the plurality decision in *Bandemer* with Justice O'Connor's critical characterization of the plurality decision, so as to cobble together a purported majority view.

Appellants seek to transform a rationale for justiciability into a standard of proof in order to ease their burden. But as every three-judge court addressing the issue has recognized, the *Bandemer* plurality set a standard that would be most difficult to meet. The three-judge court below did not err in its choice of standard or in its application. Its analysis is consistent with that of numerous other three-judge courts that have dismissed partisan gerrymandering claims for lack of allegations sufficient to meet the discriminatory effects prong of the *Bandemer* standard. *See e.g., Badham v. Eu*, 694 F. Supp. 664 (N.D.

Cal. 1988), *aff'd*, 488 U.S. 1024 (1989) (motion to dismiss); *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992) (motion to dismiss); *Holloway v. Hechler*, 817 F. Supp. 617 (S.D. W.Va. 1992), *aff'd*, 507 U.S. 956 (1993) (motion to dismiss); *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (defendants' motion for summary judgment); *White v. Alabama*, 867 F. Supp. 1571 (M.D. Ala. 1994) (defendants' motion for summary judgment); *O'Lear v. Miller*, 2002 U.S Dist. LEXIS 9533 & 10010 (E.D. Mich. No. 01-72584, decisions issued May 24 & June 5, 2002) (motion to dismiss).

B. Racial Gerrymandering Decisions

In contesting the three-judge court's application of the discriminatory effects test of *Bandemer*, Appellants fault the court for ignoring recent decisions in the racial discrimination context which Appellants claim provide "direction on how to identify an unconstitutional gerrymander [.]" J.S. at 23. The court below, however, was absolutely correct in not relying on *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), to interpret *Bandemer*. The concepts applicable to partisan gerrymandering and racial gerrymandering are not interchangeable.

While the plurality in *Bandemer* did derive its standard for a *prima facie* showing of partisan gerrymandering from the Court's racial gerrymandering decisions, the partisan gerrymandering showing, as the plurality stressed, is different from that applied to other equal protection claims, including allegations of racial gerrymandering. *See Bandemer*, 478 U.S. at 134 n.14 ("The requirement of a threshold showing is derived from the peculiar characteristics of these political gerrymandering claims. We do not contemplate that a similar requirement would apply to our Equal Protection cases outside of this particular context.").

To establish a *prima facie* showing of racial gerrymandering in the redistricting context, a plaintiff must show that:

> race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can defeat a claim that a district has been gerrymandered on racial lines.

Miller, 515 U.S. at 916 (quoting *Shaw*, 509 U.S. at 647) (emphasis added). This is a very different showing than that required under *Bandemer*. *See* 478 U.S. at 127 (plaintiff must allege "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group").

Importantly, in *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("*Hunt I*"), this Court deemed "constitutional political gerrymandering" (i.e., that which is not invalid under *Bandemer*) to be a "traditional race-neutral principle." *See also Hunt v. Cromartie*, 532 U.S. 234 (2001) ("*Hunt II*") (concluding that "politics" and not race was the predominant reason for the challenged district being drawn as it was). In *Hunt I*, this Court concluded that summary judgment for those challenging the plan was improper because there was a material question of fact as to whether the legislature's predominant intent in drawing the challenged district was political or racial. In neither *Hunt I* nor *Hunt II* did this Court provide an exclusive list of what

constitutes permissible "political" intent. Among the political items being asserted by the defenders of the plan were "the intent to make [the challenged district] a strong Democratic district" and "protect[ing] incumbents." *Hunt I*, 526 U.S. at 549. In other words, it can be legitimate for politics to be a predominant reason for drawing districts, but it is never legitimate for race to be so.

Another difference between racial and partisan gerrymandering is the level of scrutiny applied. In racial gerrymandering claims, once it is shown that race was the predominant reason for drawing a district, a *prima facie* showing has been made and the burden shifts to the proponent of the plan to show a compelling state interest to justify the use of race, i.e., strict scrutiny applies. *Miller*, 515 U.S. at 920. Strict scrutiny is used because classification on the basis of race is suspect. *See Shaw*, 509 U.S. at 642 ("racial classifications are immediately suspect"). Partisan gerrymandering is different. Classification on the basis of major political party, party registration, or voter performance is not suspect and is not, in and of itself, unconstitutional. Political gerrymandering is not subject to strict scrutiny. *See Bush v. Vera*, 517 U.S. 952, 964 (1996) ("We have not subjected political gerrymandering to strict scrutiny."). In other words, only a rational basis need exist to support partisan gerrymandering. As this Court explained in *Shaw*:

> This Court has held political gerrymanders to be justiciable under the Equal Protection Clause. *But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny.* In fact, our country's long and persistent history of racial discrimination in voting – as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race – would seem to compel the opposite conclusion.

509 U.S. at 650 (citations omitted; emphasis added).

The use of strict scrutiny every time partisan affiliation was used as a factor – even as the predominant reason – for drawing district lines, would create monumental problems. As the *Bandemer* plurality explained:

> [W]e [] reject the District Court's apparent holding that *any* interference with an opportunity to elect a representative of one's choice would be sufficient to allege or make out an equal protection violation, unless justified by some acceptable state interest that the State would be required to demonstrate. In addition to being contrary to the above-described conception of an unconstitutional political gerrymander, such a low threshold for legal action would invite attack on all or almost all reapportionment statutes. District-based elections hardly ever produce a perfect fit between votes and representation. The one person, one vote imperative often mandates departure from this result ... .

478 U.S. at 133 (emphasis in the original).

In addition to these notable differences between the analyses for racial and partisan gerrymandering, the theory that Appellants would pull from the *Shaw* line of cases for application here – i.e., that a state legislature cannot redistrict in a fashion that subordinates all "traditional redistricting criteria" to achieve a certain partisan ends – was rejected by the plurality in *Bandemer*. In responding to Justice Powell's suggested standard for identifying an unconstitutional partisan gerrymander, the plurality stated:

> [T]he crux of Justice Powell's analysis seems to be that – at least in some cases – the intentional drawing of district boundaries for partisan ends and for no other reason violates the Equal Protection

> Clause in and of itself. We disagree, however, with this conception of a constitutional violation. Specifically, even if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, we do not believe that there has been an unconstitutional discrimination against members of that party unless the redistricting does in fact disadvantage it at the polls.

478 U.S. at 138-139. The *Shaw* line of cases offers no guidance on the interpretation and application of *Bandemer*. *See also O'Lear v. Miller*, 2002 U.S Dist. LEXIS 9533 (E.D. Mich. No. 01-72584, issued May 24, 2002) (reaching the same conclusion).

C. U.S. CONST. art. I, §4

Appellants urge the Court to announce in this case that U.S. CONST. art. I, §4 – independent of the Fourteenth Amendment – operates to forbid partisan gerrymandering.[7]

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[7] In their Jurisdictional Statement, Appellants state that the three-judge court granted the motion to dismiss their "political gerrymandering claims" and "examined those claims entirely within the framework set forth by the plurality opinion in [] *Bandemer*, never acknowledging (despite a motion for reconsideration) Appellants' separate Article I Arguments." J.S. at 6 (emphasis added). This recitation of events is misleading. As explained above, the February 22, 2002 opinion and order which dismissed Claim II (partisan gerrymandering under the Fourteenth Amendment) left pending Claim I (alleged violation of the one-person, one-vote principle). Plaintiffs filed a Motion for Clarification and/or Reconsideration, asking the court to clarify whether, by not dismissing Claim I, it had left pending the partisan gerrymandering claim based on U.S. CONST. art. I, §4 which was supposedly encompassed within Claim I. Presiding Officers responded, *inter alia*, that because Plaintiffs had argued in response to the motions to dismiss that U.S. CONST. art. I, §4 operated as an independent restriction of

Appellants argue that "Article I strictly constrains the political faction that happens to control the state legislature at the right moment in the 10-year congressional redistricting cycle from dictating the composition of Pennsylvania's congressional delegation ... ." J.S. at 29. Quoting from the dissent in *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F.Supp. 394, 402-03 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992), Appellants argue that "[u]nder Article I, 'the state may not attempt to dictate the outcome of congressional elections' by drawing congressional districts that confer a substantial advantage on one political party." J.S. at 29-30.

In support of this asserted U.S. CONST. art I, §4 prohibition, Appellants interpret decisions of this Court – decided in markedly different contexts – to stand for a general principle that "Article 1 forbids States from using their Section 4 authority to thwart the will of the majority of voters ... ." J.S. at 26. U.S. CONST. art. I, §4, however, has never been used as an independent basis for invalidating congressional redistricting legislation as a political gerrymander and the cases relied on by Appellants offer no substantial reason for it to be so used. *See U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (invalidating state constitutional amendment prohibiting the name of an otherwise eligible candidate for Congress from appearing on the general election ballot if that candidate has already served set number of terms); *Cook v. Gralike*, 531 U.S. 510 (2001) (invalidating state constitutional amendment providing that members of state's congressional delegation or candidates who failed to

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partisan gerrymandering and the court, in addressing Claim I, had focused solely on the standard for resolving one-person, one-vote claims, the court had implicitly rejected Plaintiffs' theory. The court denied the Plaintiffs' Motion for Clarification and/or Reconsideration on February 26, 2002.

support an attempt to amend the U.S. Constitution to include term limits would be noted as such on the ballot).

U.S. CONST. art. I, §4 is an express grant of authority to state legislatures and to Congress to regulate the time, place and manner of congressional elections. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932) (the words of art. I, §4 "embrace authority to provide a complete code for congressional elections"); *Oregon v. Mitchell*, 400 U.S. 112, 119 (1970) ("In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed advisable to do so").[8] While this Court has stated that U.S. CONST. art. I, §4 cannot be used to "immunize state congressional reapportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction," *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964), it has never recognized the provision as providing an independent, private cause of action for partisan gerrymandering in the context of redistricting by an affected individual. State legislatures or Congress, to whom the manner of holding elections is delegated, might have authority to impose such a restriction by statute, but, with respect to Appellants' attempted application of the restriction, U.S. CONST. art. I, §4 cannot be used to vindicate private interests.[9]

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[8] As Justice Black noted in *Oregon*, U.S. CONST. art. I, §4 "was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the elections of all state and federal officers and those who wanted Congress to make laws governing national elections." 400 U.S. at 119 n.2 (citing 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 280-292 (1st ed. 1833)).

[9] Appellants complain that the three-judge court ignored this claim. However, given the manner in which Appellants

At best, Appellants' argument that U.S. CONST. art. I, §4 provides protection against a plan that is designed to dictate electoral outcomes is essentially an argument in favor of proportionality. Such a requirement has been roundly rejected in the redistricting context. For example, as the plurality stressed in *Bandemer*, "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination." 478 U.S. at 132. As Justice O'Conner pointed out, such a requirement is inconsistent with the concept of electing representatives by districts:

> Districting itself represents a middle ground between winner-take-all statewide elections and proportional representation for political parties. If there is a constitutional preference for proportionality, the legitimacy of districting itself is called into question: the voting strength of less evenly distributed groups will be invariably diminished by districting as compared to at-large

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buried the claim in their Amended Complaint, there was no reason for the court to address it. If Appellants had believed they had two separate causes of action arising under U.S. CONST. art. I, they should have pleaded two distinct "counts" (not "claims") in order to facilitate clear presentation of "the matters set forth." Fed. R. Civ. P. 10(b); *see also Nemitz v. Cunny*, 221 F. Supp. 571, 575 (N.D. Ill. 1963) ("different causes of action based on different legal theories, even though based on essentially identical facts, should be alleged in separate counts"). Because, in the Amended Complaint, "Claim I" consisted of a mere citation to the United States Constitution, it is not surprising that the three-judge court treated Claim I as alleging only a vote-dilution claim. Appellants' wholly inadequate presentation of the claim is a sufficient basis to find the question presented concerning U.S. CONST. art. I, §4 insubstantial and to support summary affirmance.

> proportional systems for electing representatives. Moreover, one implication of the districting system is that voters cast votes for candidates in their districts, not for a statewide slate of legislative candidates put forward by the parties. Consequently, efforts to determine party voting strength presuppose a norm that does not exist – statewide elections for representatives along party lines.

478 U.S. at 159 (O'Connor, J., concurring in the judgment only).[10]

Appellants offer no principled basis for constitutionalizing proportionality and thereby avoiding the difficult challenge of establishing the discriminatory effects prong of the *Bandemer* standard for unconstitutional partisan gerrymandering. The question they present regarding U.S. CONST. art. I, §4 is not substantial and offers no basis for this Court to do other than summarily affirm the three-judge court's decision to dismiss the partisan gerrymandering claim.

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[10] Appellants attempted precisely what Justice O'Connor cautioned against. The Amended Complaint pleaded facts about statewide races to support the partisan gerrymandering claim. Ironically, the facts pleaded undercut their argument. E.g., in 2000, Democrat candidates won only 2 out of 5 statewide races. *See supra* n.2.

CONCLUSION

For the foregoing reasons, the present appeal should be dismissed for lack of jurisdiction, or, in the alternative, the decision below, which dismissed the partisan gerrymandering claim for failure to state a claim, should be summarily affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 23 2002
CLERK

(3)

No. 01-1873

In the Supreme Court of the United States

RICHARD VIETH, ET AL.,
Appellants

v.

ROBERT C. JUBELIRER, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM OF APPELLEES SCHWEIKER, WEAVER AND FILLING

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QUESTIONS PRESENTED

1. Whether the Court lacks jurisdiction over this appeal because it was not timely filed?

2. Whether the District Court correctly dismissed the appellants' claim of partisan gerrymandering in Pennsylvania's congressional redistricting plan?

PARTIES TO THE PROCEEDING

The appellants are Richard and Norma Jean Vieth and Susan Furey.

The appellees on whose behalf this motion is filed are Mark S. Schweiker, the Governor of Pennsylvania; C. Michael Weaver, the Secretary of the Commonwealth[1]; and Richard Filling, the Commissioner of Pennsylvania's Bureau of Commissions, Elections and Legislation.

Other appellees, separately represented, are Robert C. Jubelirer, the Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate; Matthew J. Ryan, Speaker of the Pennsylvania House of Representatives; and the Republican Caucus of the Pennsylvania House of Representatives. In addition, Robert J. Mellow, a Pennsylvania state senator, has moved to intervene in the District Court, and his motion was pending when this motion was filed.

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[1]Mr. Weaver has been substituted for his predecessor, Kim Pizzingrilli, pursuant to Supreme Court Rule 35.3.

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OPINIONS BELOW

The District Court's opinion of February 22, 2002 is reported at 188 F.Supp.2d 532 and is reprinted in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a. A later opinion of the District Court, filed on April 8, 2002, is reported at 195 F.Supp.2d 672 and is reprinted at J.S. App. 34a.

STATEMENT OF JURISDICTION

As we explain more fully in the argument section of this motion, the Court lacks jurisdiction over this appeal because it is untimely. This is an appeal from an interlocutory order issued by a three-judge district court denying an injunction, and the appellants assert that the Court has jurisdiction over it pursuant to 28 U.S.C. § 1253. The District Court's order was entered on February 22, 2002, and the appellants filed their notice of appeal *sixty* days later, on April 23, 2002. J.S. at 1. *Cf.* 28 U.S.C. § 2101(b) (direct appeal to Supreme Court from interlocutory order of district court to be taken within *thirty* days).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 4 of the Constitution provides in relevant part that "[t]he times, places and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof...."

2. Section 1 of the Fourteenth Amendment to the Constitution provides in relevant part that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

3. Section 1 of Pennsylvania's Act 2002-1 ("Act 1"), *to be codified at* Pa. Stat. Ann., tit. 25, § 3595.1(Purdon), is not reprinted in the Appendix to the Jurisdictional Statement, although several maps which purport to reflect Act 1 are reprinted at J.S. App. 135a-37a. Act 1 is reprinted in 2002 Purdon's Pa. Leg. Serv. No. 1, and is available on WestLaw at PA ST 25 P.S. § 3595.1.[2]

4. Pennsylvania's Act 2002-34 ("Act 34"), *to be codified at* Pa. Stat. Ann., tit. 25, §§ 3595.101 through 3595.501(Purdon), is not reprinted in the Appendix to the Jurisdictional Statement. It is available on WestLaw at PA ST 25 P.S. § 3595.101 *et seq.*[3]

STATEMENT OF THE CASE

This case arises out of the congressional redistricting plan adopted by the Pennsylvania legislature in the wake of the 2000 decennial census. The appellants are three Pennsylvania voters who claim that this redistricting plan offends the Constitution. They brought this action pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the Governor of Pennsylvania and other state officials.

1. As a result of the 2000 decennial census, Pennsylvania's congressional delegation was reduced from twenty-one to nineteen representatives. J.S. App. 2a. In response, the Pennsylvania General Assembly enacted Act 2002-1 ("Act 1"), which redivided the

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[2]Act 1 is also reprinted in the Appendix to the Jurisdictional Statement in No. 01-1823 at 54a (filed June 10, 2002).

[3]Act 34 is also reprinted in the Appendix to the Jurisdictional Statement in No. 01-1823 at 69a (filed June 10, 2002).

Commonwealth among nineteen congressional districts.[4] Although the appellants condemn Act 1 as an exercise in "extreme ... partisan bias,"[5] J.S. at 3, they acknowledge (in a footnote) that in fact Act 1 enjoyed bipartisan support. J.S. at 3 n.1. Forty-two — nearly half — of the members of the Democratic Caucus of the Pennsylvania House of Representatives voted in favor of Act 1, and without the support of these House Democrats Act 1 would not have passed. J. S. App. 77a.

Of the Commonwealth's roughly 7.7 million registered voters, about 3.7 million (48%) are Democrats, and about 3.2 million (42%) are Republicans. J.S. App. 72a. Of the nineteen congressional districts created by Act 1, seven have a majority Democrat registration and seven have a majority Republican registration. In the remaining five districts, two have a Democrat plurality of registered voters and three have a Republican plurality. J.S. App. 78a-79a. Nevertheless, appellants allege that, in elections held in these districts, Republicans are likely

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[4]Act 1, *to be codified at* Pa. Stat. Ann., tit. 25 §3595.1 (Purdon), is not reprinted in the Appendix to the Jurisdictional Statement. It is available in 2002 Purdon's, Pa. Leg. Serv. 1 and on WestLaw at Pa. St. 25 P.S. §3595.1. Act 1 is also reprinted in the Appendix to the Jurisdictional Statement at No. 01-1823 at 54a (filed June 10, 2002).

[5]Appellants, relying on an opinion piece in a legal newspaper, say that Act 1 "received national attention as 'the most partisan congressional gerrymander of this young century, and among the worst in the last several decades of the earlier millennium.'" J.S. at 3, *quoting* G. Harvey, *Redistricting Plan Draws the Line Between Equal and Fair*, Legal Intelligencer, May 20, 2002. The newspaper notes, as the appellants do not, that this hyperventilating assessment comes from a Democrat Party ward officer. *Ibid*, available on WestLaw at 5/20/2002 Legal Intelligencer 6.

to win thirteen of the nineteen seats, and Democrats six.[6] J.S. App. 126a.

The appellants also assert that Republicans have "essentially shut Democrats and Democratic voters out of the political process." J.S. App. 128a. The complaint, however, contains no allegations to support this conclusory assertion. As the District Court remarked,

> there are no allegations that anyone has ever prevented, or will ever prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of pubic concern.

J.S. App. 27a.

2. The voters brought this action in the Middle District of Pennsylvania, which convened a three-judge court pursuant to 28 U.S.C. § 2284. In the District Court, the voters raised two principle claims: first, that the congressional districts drawn by Act 1 represented an impermissible partisan gerrymander, in violation of the principles recognized in *Davis v. Bandemer*, 478 U.S. 109 (1986); and second, that Act 1's districts were not precisely equal and therefore violated the Constitution's guarantee of one person, one vote. J.S. at 4-5; J.S. App. 6a-7a.

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[6]In Pennsylvania's current congressional delegation, eleven members are Republicans and ten are Democrats. J.S. App. 73a. In statewide elections since 1998, Republican candidates have won thirteen elections and Democrats have won three. J.S. App. 73a-75a.

On February 22, 2002, the District Court dismissed the appellants' partisan gerrymandering claim.[7] J.S. App. 28a, 32a-33a. The District Court held that

> [appellants'] allegations amount to this[:] Act 1 is rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republicans. As a result, Democrats will have a more difficult time electing their candidates.

J.S. App. 25a. This, the District Court said, "is simply an argument for proportional representation. However, *Bandemer* soundly rejected such a basis for an equal protection violation." *Ibid.* The District Court therefore held that appellants' allegations were "insufficient to make out a cause of action" under *Bandemer.* The District Court, however, declined to dismiss appellants' one person, one vote claim. J.S. App. 16a-20a.

On April 8, 2002, after an evidentiary hearing, the District Court by a divided vote struck down Act 1 on one person, one vote grounds.[8] J.S. App. 34a. The District

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[7]At the same time, the District Court dismissed claims based on the Privileges and Immunities Clause, the First Amendment, and Section 1983, for failure to state a claim, and dismissed all claims against the Commonwealth itself on the basis of the Commonwealth's Eleventh Amendment immunity. J.S. App. 10a-11a, 28a-30a.

[8]The census reported that Pennsylvania's total population was 12,281,054 persons, so that the "ideal" population for each of the Commonwealth's nineteen congressional districts is either 646,371 or 646,372 persons. J.S. App. 34a-35a, 46a n.6. None of the congressional districts created by Act 1 has a population which is more than ten

(continued...)

Court enjoined the implementation of Act 1, and ordered the Pennsylvania General Assembly to enact a new redistricting plan and submit it to the court for its review and approval. J.S. App. 45a. The District Court retained jurisdiction "pending issuance of a final order." *Ibid.*

The District Court stayed its injunction pending the disposition of appeals taken by the Governor and other defendants,[9] and Pennsylvania held its primary election on May 21, using the congressional districts drawn by Act 1. In the meantime, the Pennsylvania General Assembly enacted a revised congressional redistricting plan, known as Act 2002-34 ("Act 34") which the Governor signed into law on April 18, 2002.

As of the filing of this motion, the District Court has not yet issued a final order. The District Court has retained jurisdiction to decide whether Act 34 remedies the constitutional violations which it found in Act 1, but has not yet decided that issue. *See* Dist. Ct. Order of April 23, 2002. At the District Court's order, the defendants submitted a status report on June 3, 2002;

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[8](...continued)
persons above or below this "ideal" population; and Act 1's overall deviation from absolute equality — that is, the difference between the most and least populous districts — is nineteen persons, or 0.003%. J.S. App. 36a.

[9]The appeal of the Governor and other executive branch defendants is docketed at No. 01-1823; and the appeal of defendants from the legislative branch is docketed at No. 01-1817. The District Court, by order entered on April 12, 2002, initially declined to stay its order, and the Governor and other defendants applied for a stay to Justice Souter as Circuit Justice for the Third Circuit. While that application was pending, the District Court granted a renewed motion for a stay, by order entered April 23, 2002.

and the District Court has ordered that a further status report be filed by August 19, 2002. *See* Dist. Ct. Orders of May 2 and June 19, 2002.[10]

3. In the meantime, appellants appealed the District Court's February decision dismissing their partisan gerrymandering claim to this Court. The District Court's order was entered on February 22, and the appellants filed their notice of appeal sixty days later, on April 23, 2002. J.S. at 1.

THE COURT SHOULD DISMISS THIS APPEAL AS UNTIMELY, OR IN THE ALTERNATIVE SHOULD SUMMARILY AFFIRM THE DISTRICT COURT'S DECISION

I. The Court Lacks Jurisdiction over this Appeal, Which Is Untimely.

The appellants filed their notice of appeal in the District Court on the sixtieth day after the entry of the order appealed from. J.S. at 1 ("The notice of appeal was filed 60 days later.") The governing statute, however, required them to file within thirty days, and the Court therefore lacks jurisdiction over their appeal.

This Court's Rule 18 provides that when a direct appeal from a district court decision is authorized, the appeal is commenced by filing a notice of appeal in the district court "within the time provided by law...." Sup. Ct. R. 18.1. The time for taking such appeals is in turn governed by 28 U.S.C. § 2101. Section 2101 first provides, in subsection (a), that a direct appeal to this Court from an order holding an Act of Congress

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[10]The District Court's orders of April 23, May 2 and June 19, 2002, are reprinted in the Appendix to this motion.

unconstitutional shall be taken within thirty days after the entry of the decision appealed from. The statute then goes on, in subsection (b), to provide that

> any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action ... shall be taken *within thirty days* from the judgment, order or decree, appealed from, *if interlocutory*, and within sixty days, if final.

Id., § 2101(b) (emphases added). Section 2101(b) does not empower the Court to extend these times, and the Court's Rule 18.1 recognizes that "[t]he time to file may not be extended." *Cf.* 28 U.S.C. § 2101(c) (time for filing petition for writ of certiorari may be extended for good cause); Sup. Ct. R. 13.5 (same).

In this case, the order appealed from — the order of February 22, 2002 — is plainly interlocutory rather than final. The appellants characterize this order as a "final" dismissal of their partisan gerrymandering claim, J.S. at 1, but that is incorrect. As the Court has often said,

> the term "final decision" has a well-developed and longstanding meaning. It is a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.

Green Tree Financial Corp — Alabama v. Randolph, 531 U.S. 79, 86 (2000) (internal quotation marks and citations omitted). The order appealed from in this case is not such an order.

As the appellants themselves recognize, the action they filed involves multiple claims presented by multiple parties, J.S. at 4-5; and — as again the appellants

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recognize — the order they are appealing did not adjudicate all of those claims. J.S. App. 31a-32a; *see* J.S. at 7 ("Appellants' one-person, one-vote claim was not dismissed [by the February 22 order].")[11] The rules of civil procedure provide that in such a case, a district court *may*, under certain circumstances, direct the entry of a final judgment as to the claims decided. Fed. R. Civ. Proc. 54(b). *See generally Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980). But if that does not happen — and it did not happen here — then Rule 54(b) provides that

> any order ... which adjudicates fewer than all the claims ... shall not terminate the action as to *any* of the claims ... and is subject to revision at any time before the entry of judgment adjudicating all the claims.

Ibid (emphasis added).

The District Court's February 22 order, which adjudicated "fewer than all the claims," thus did "not terminate the action as to [appellants' partisan gerrymandering] claim[]," and is "subject to revision at any time" until all their claims have been adjudicated — an event which has not yet happened. It is an interlocutory order within the meaning of 28 U.S.C. § 2101(b), and the thirty-day limit for filing a notice of appeal applies. Since the appellants concede that they did not file their notice of appeal until the sixtieth day, J.S. at 1, their appeal is untimely and the Court should dismiss it for lack of jurisdiction. *See United States Civil Service Comm. v. Ramos*, 426 U.S. 916 (1976) (per curiam)(appeal dismissed for lack of jurisdiction where

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[11]Indeed, the District Court has not, to this day, entered a final order in this action. *See supra* at 5-7.

notice of appeal not filed within 30 days of any arguably appealable order); *Territo v. United States*, 358 U.S. 279 (1959)(per curiam)(appeal dismissed where notice of appeal not filed within the time provided by law).

In any event, the District Court correctly decided appellants' partisan gerrymandering claim and the Court, if it decides their appeal at all, should summarily affirm the District Court's decision.

II. The District Court Correctly Dismissed the Appellants' Claim of Partisan Gerrymandering, and Appellants Have Not Presented a Substantial Question to the Contrary.

A. Appellants' claim that they were deprived of proportional representation is foreclosed by *Davis v. Bandemer*.

As the District Court recognized, appellants' political gerrymandering claim "is simply an argument for proportional representation." J.S. App. 25a. And as the District Court correctly pointed out, allegations of this kind, without more, "are insufficient to make out a cause of action for violation of equal protection." *Ibid, citing Davis v. Bandemer*, 478 U.S. at 130. Rather, *Bandemer* required the appellants to establish, not just a history of disproportionate election results, but *also* that "the electoral system is arranged in a manner that will consistently degrade a voter's, or group of voter's influence on the political process as a whole." J.S. App. 21a-22a, *quoting Bandemer*, 478 U.S. at 105.

The appellants argue, not merely that *this* District Court erred in reading *Bandemer* this way, but that *every* case applying *Bandemer* — including a slew of decisions summarily affirmed by this Court — has committed the same error. J.S. at 19 ("All of the cases construing

Bandemer share the same ... basic flaws.") *See* J.S. at 16 n.5 (collecting cases summarily affirmed by the Court). In the appellants' view, *Bandemer* required them to show "a history (actual or projected) of disproportionate results," and nothing more. J.S. at 22. We submit, however, that this argument does not present a substantial question for the Court's consideration; it is the appellants, and not the entire federal judiciary, who misunderstand *Bandemer*.

There is no question that *Bandemer* is, in many respects, a problematic decision which has been severely criticized both within and without the Court. *Bandemer's* holding that a claim of partisan gerrymandering presents a justiciable claim was adopted only over the vigorous dissent of three Justices. *See id.*, 478 U.S. at 144 (O'Connor, J., concurring in the judgment). Further, the lack of a majority opinion on the elements of such a claim, and what the District Court in this case called the "recondite standard" in the plurality opinion, J.S. App. 22a, offer little guidance to the lower courts. *See Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002), *reprinted at* J.S. App. 60a ("plurality's opinion ... obscur[es] precise nature of the standard to be employed"); M. Lewyn, *How to Limit Gerrymandering*, 45 FL. L. REV. 403, 443 (1993)(collecting commentary).

Nevertheless, on the point raised by the appellants, *Bandemer* could not be more clear: all seven of the Justices who concurred in the judgment flatly rejected the idea that a lack of proportional representation, without more, violates the Equal Protection Clause. As the *Bandemer* plurality said,

> Our cases ... clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw

> district lines to come as near as possible to allocation seats to the contending parties in proportion to what their anticipated statewide vote will be.

Id., 478 U.S. at 130 (plurality opinion). To the contrary,

> [W]e have required a *substantially greater showing of adverse effects than a mere lack of proportional representation* to support a finding of unconstitutional vote dilution. ... These holdings rest on a conviction that the mere fact that a particular apportionment scheme makes it more difficult for a particular group ... to elect the representatives of its choice does not render that scheme constitutionally infirm.

Id., 478 U.S. at 131 (plurality opinion) (emphasis added). *Accord id.*, at 145 (O'Connor, J., concurring in the judgment) (proportional representation not "consistent with our history, our traditions, or our political institutions"), 155 (proportionality requirement would be "calamitous for the federal courts, for the States, and for our two-party system").

Thus, there may well be doubts about the correctness of *Bandemer's* holding that claims of partisan gerrymandering are justiciable at all. And if such claims are justiciable, there may well be doubts about the precise nature of the "substantially greater showing of adverse effects," beyond a mere lack of proportional representation, which a plaintiff must make to establish such a claim. But there is no doubt at all that *some* showing beyond a mere lack of proportionality must be made, and that appellants failed to make *any* such showing in this case. The appellants have thus not raised

any substantial question about the correctness of the District Court's reading of *Bandemer*.

B. *Shaw v. Reno* and its progeny do not change this result.

Appellants argue, however, that the Court's decisions in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny have changed — or as they put it, "clarified" — the analysis of partisan gerrymandering claims from that set forth in *Bandemer*. J.S. at 23-26. According to the appellants, drawing districts on partisan lines is constitutionally indistinguishable from drawing them on racial lines, and should be analyzed the same way. J.S. at 24. *Shaw* itself, however, explicitly rejects this premise.

The Court in *Bandemer* rejected the view, expressed in Justice Powell's dissenting opinion, that "the intentional drawing of district boundaries for partisan ends and for no other reasons violates the equal protection clause in and of itself." *Bandemer*, 478 at 138 (plurality opinion); *id.*, at 144 (O'Connor, J., concurring in the judgment) (partisan gerrymandering claims not justiciable at all). In *Shaw v. Reno, supra*, on the other hand, the Court held that "segregat[ing] voters into separate voting districts because of their race" does violate the Equal Protection Clause, unless it is narrowly tailored to serve a compelling state interest. *Id.*, 509 U.S. at 658. As the Court remarked:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.

Id., at 647.

The Court, however, specifically rejected the appellants' notion that this approach to *racial* gerrymandering claims would likewise apply to claims of *partisan* gerrymandering.

> Classifying citizens by race, as we have said, threatens special harms that are not present in our vote-dilution cases. *It therefore warrants different analysis.*
>
> The dissenters ... suggest that a racial gerrymander of the sort alleged here is functionally equivalent to gerrymanders for nonracial purposes, such as political gerrymanders. ... But nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting — as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race... — would seem to compel the opposite conclusion.

Id., at 650 (emphasis added). Even the dissenters in *Shaw* did not adopt the appellants' position. They argued, not that claims of partisan gerrymandering should be analyzed under *Shaw*, but the other way around: that the racial gerrymandering claim in *Shaw* should have been analyzed under the relatively lenient standard of *Bandemer*. *Shaw*, 509 U.S. at 662-63 (White, J., dissenting).

Later cases, as the appellants concede, continue to recognize this "distinction between race and politics as districting criteria." J.S. at 24, *citing Hunt v. Cromartie*,

526 U.S. 541 (1999) *and Easley v. Cromartie*, 532 U.S. 234 (2001). As Justice O'Connor succinctly put it, "[p]olitical affiliation is the keystone of the political trade. Race, ideally, is not." *Bandemer*, 478 U.S. at 161 (O'Connor, J., concurring in the judgment), *quoting United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 171 n.1 (1977) (Brennan, J., concurring). That distinction is firmly rooted in our history and in the Constitution, and appellants have offered no substantial reason to reexamine it.

C. Article I, Section 4 of the Constitution adds nothing to appellants' equal protection claim.

Finally, appellants claim that Article I, § 4 of the Constitution places limits on the States' redistricting authority which are more stringent than those of the Equal Protection Clause as interpreted in *Bandemer*. J.S. at 26. They offer no principled reason, however, why this should be so, and neither text of Article I, § 4, nor the Court's decisions, offer them any support.

Article I, §4 provides that:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

This provision is, on its face, a positive grant of authority to the States; it does not, by its terms, forbid the States from doing anything, nor has the Court so interpreted it. When the Court has invalidated state election measures, it has done so either because the measures violated other provisions of the Constitution, *see U.S. Term Limits v.*

Thornton, 514 U.S. 779 (1995) (term limit on members of Congress violated Qualifications Clauses); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (grossly malapportioned congressional districts violated Art. I, § 2); or because they exceeded the authority conferred by Article I, § 4, and were therefore simply beyond the States' power. *See Cook v. Gralike*, 531 U.S. 510 (2001). But appellants have cited no case in which the Court has held that a state provision *violated* Article I, § 4.

In this case, there is no question of Pennsylvania having exceeded its Article I, § 4 authority. Congress, exercising its own authority under Article I, § 4, has authorized and required the States to establish congressional districts. *See* 2 U.S.C. § 2c ("In each State entitled ... to more than one Representative ... there shall be established a number of districts equal to the number of Representatives...."); *id.*, § 2a (after reapportionment, States to be "redistricted in the manner provided by the law thereof"). Unless, therefore, Pennsylvania's Act 1 violates some other constitutional provision — such as the Equal Protection Clause — it must be upheld.

We have thus come full circle. Neither appellants' Article I, § 4 claim, nor their equal protection claim, presents a substantial question justifying plenary consideration by the Court.

CONCLUSION

The Court should dismiss this appeal, or in the alternative should summarily affirm the District Court's order.

Respectfully submitted,

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July 26, 2002

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	**Civil No. 1:CV-01-2439**
Plaintiffs	:	**NYGAARD, Circuit Judge**
v.	:	**YOHN, District Judge**
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	**RAMBO, District Judge**
Defendants	:	

ORDER

IT IS HEREBY ORDERED THAT Defendants' renewed motion for stay pending appeal of order granting declaratory judgment and injunction is **GRANTED**, as follows:

(1) Upon consideration of Defendants' renewed motion for a stay, the stay is **GRANTED**. Defendants will be allowed to conduct only the 2002 Congressional elections using Act 1;

(2) A hearing is scheduled for the purpose of determining whether Act 34 arguably remedies the constitutional violation found by this court in its order of April 8, 2002. Said hearing shall occur at **9:30 a.m. on Wednesday, May 8, 2002**, in Courtroom No. 2, Ninth Floor, Federal Building, Third and Walnut Streets, Harrisburg, Pennsylvania.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

on behalf of the panel

Dated: April 23, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	: CIVIL NO. 1:CV-01-2439
Plaintiffs	:
v.	:
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:
Defendants	:

ORDER

The background of this order is as follows: On May 2, 2002, the court and counsel for the respective parties held a conference call to outline the issues remaining before the court. As a result of that call, IT IS HEREBY ORDERED that:

(1) The hearing scheduled to take place on May 8, 2002 is CANCELED;

(2) By June 3, 2002, Defendants shall file a status report with the court indicating whether the dispute over the order issued by the Court of Common Pleas for Armstrong County Pennsylvania on March 15, 2002 ("the Armstrong County order") has been resolved. Specifically, the parties shall address the following issues:

> (A) If the matter has been resolved, has the line separating the South Buffalo Township election district from the Eastern Buffalo Township election district been restored to its original

configuration prior to the Armstrong County order?;

(B) If the line has not been restored, did the Armstrong County order result in a movement of population between congressional districts?;

(C) If the line drawn by the Armstrong County order resulted in a movement of population between congressional districts, how many people have been moved?;

(D) If the Armstrong County order issue has not been resolved, are Defendants pursuing the matter through litigation?;

(3) Plaintiffs shall file by any objections to Defendants' submission with the court by June 18, 2002.

SYLVIA H. RAMBO
United States District Judge
on behalf of the panel

Dated: May 2, 2002.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	: CIVIL NO. 1:CV-01-2439
Plaintiffs	:
v.	:
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:
Defendants	:

ORDER

On May 2, 2002, the court issued an order staying the court's remedial hearing for sixty days. The court also required Defendants to file a status report at the conclusion of this period. On June 3, 2002, Defendants filed the required status reports indicating that the Armstrong County, Pennsylvania Board of Elections has petitioned the Armstrong County Court of Common Pleas to vacated its order that re-drew the boundary between the Eastern and Southern Buffalo Township voting precincts. That court has set the matter for a hearing on July 15, 2002.

Accordingly, IT IS HEREBY ORDERED that:

(1) By August 19, 2002, Defendants shall file a status report with the court indicating whether the dispute over the order issued by the Court of Common Pleas for Armstrong County Pennsylvania on March 15, 2002 ("the Armstrong County order") has been resolved. Specifically, the parties shall address the following issues;

(A) If the matter has been resolved, has the line separating the South Buffalo Township election district from the Eastern Buffalo Township election district been restored to its original configuration prior to the Armstrong County order?;

(B) If the line has not been restored, did the Armstrong County order result in a movement of population between congressional districts?;

(C) If the line drawn by the Armstrong County order resulted in a movement of population between congressional districts, how many people have been moved?;

(D) If the Armstrong County order issue has not been resolved, are Defendants pursuing the matter through litigation?;

(2) Plaintiffs shall file by any objections to Defendants' submission with the court by September 3, 2002.

SYLVIA H. RAMBO
United States District Judge
on behalf of the panel

Dated: June 19, 2002.

Supreme Court, U.S.
FILED
AUG 13 2002
OFFICE OF THE CLERK

No. 01-1873

IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*,
Appellants,

v.

ROBERT C. JUBELIRER AND MATTHEW J. RYAN, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

APPELLANTS' BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

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Appellants Richard Vieth, Norma Jean Vieth, and Susan Furey – plaintiffs in the district court – hereby respond to the motions to dismiss or affirm filed by appellees Robert C. Jubelirer, *et al.* and Governor Mark S. Schweiker, *et al.* – defendants in the district court. Neither set of appellees has responded effectively to the central points made in the Jurisdictional Statement. First, they cannot explain why it is constitutionally justifiable to allow one political party to use its temporary control of a state legislature and governor's office to cement its grip on a super-majority of a State's congressional seats through shameless gerrymandering, even though a majority of votes for Congress regularly go to the opposing party. Second, and relatedly, they have not explained why it makes sense for the courts to pretend that there are meaningful constitutional constraints on partisan gerrymandering while in practice requiring plaintiffs to allege and prove additional facts, unrelated to redistricting, that *never actually exist* (and would be independently unconstitutional if they ever did exist). Instead of addressing these central questions, appellees offer two different but equally unsupported and untenable jurisdictional arguments, apparently hoping to avoid consideration of the merits. Then, discussing the merits, they simply ignore the hard issues.

The Court should note probable jurisdiction.

I. THE COURT HAS JURISDICTION TO HEAR THIS APPEAL.

Under 28 U.S.C. § 1253, the Court has jurisdiction to hear this timely appeal of the district court's final resolution of plaintiffs' claim for injunctive relief from Act 1's partisan gerrymander. The district court's February 22, 2002 order granted defendants' motion to dismiss "Counts II, III, IV, and V of the amended complaint," *see* J.S. App. 32a, thus disposing entirely of plaintiffs' partisan gerrymandering claims. The Jubelirer appellees argue that the February 22 order was not "an order . . . denying . . . an . . . injunction" for purposes of

section 1253. *See* Jubelirer Mot. to Dismiss or Affirm at 7-9. They contend that (1) a grant of dismissal is not a denial of injunctive relief to the plaintiffs and (2) this rule should be applied more strictly because the dismissal left another unrelated claim in the plaintiffs' complaint alive.

These arguments are clearly wrong. They ignore established precedent and would render many merits rulings of three-judge courts completely unreviewable by this Court on appeal. First, there is no doubt that dismissal of a complaint seeking injunctive relief, for failure to state a claim, constitutes an appealable denial of injunctive relief. This Court has exercised jurisdiction under section 1253 to review dismissal orders in a host of cases.[1] Furthermore, that interpretation is fully consistent with the law applied in the courts of appeals under the analogous jurisdictional provision – 28 U.S.C. § 1292(a)(1). *See* 11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 2d* § 2962, at 413-14 (1995) (citing cases). This Court has declined to review dismissals under section 1253 only when the dismissal was not based on the merits of the plaintiff's claim *See MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975). But that of course is not the case here.

---

[1]*See, e.g., Shaw v. Reno*, 509 U.S. 630, 637-39 (1993) (exercising jurisdiction over dismissal of racial gerrymandering claim); *Badham v. Eu*, 488 U.S. 1024 (1989) (summarily affirming district court's grant of defendants' motion to dismiss); *Pope v. Blue*, 506 U.S. 801 (1992) (summarily affirming grant of motion to dismiss); *Holloway v. Hechler*, 507 U.S. 956 (1993) (same); *see also Oldroyd v. Kugler*, 461 F.2d 535, 539 (3d Cir. 1972) (declining to exercise jurisdiction despite the lack of an explicit order denying injunctive relief and holding that "dismissal of the suit on the merits is sufficient to effect a judgment appealable to the Supreme Court under 28 U.S.C. § 1253"), *remanded to* 352 F. Supp. 27 (D.N.J. 1972), *summarily aff'd*, 412 U.S. 924 (1973).

Second, the fact that the district court's order left standing plaintiffs' one-person, one-vote claim, while dismissing the partisan gerrymandering claims, makes no difference. The Jubelirer appellees rely on the rule established in *Goldstein v. Cox*, 396 U.S. 471 (1970), that "interlocutory" appeals under section 1253 are limited to appeal from orders granting or denying preliminary injunctions. But *Goldstein* is no bar to an immediate appeal from the dismissal of an injunctive claim, regardless of whether other separate claims remain pending. *Goldstein* involved a truly "interlocutory" situation where the plaintiffs' motion for summary judgment was denied but the same claim remained alive. This case does not.

To the contrary, a dismissal of a claim is treated under section 1253 as a "final" – and thus appealable – denial of a permanent injunction, even if some *other* claim is still pending. "A final determination that a permanent injunction will not issue may be appealed even though other issues remain to be decided." 17 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4040, at 158-59 & n.56 (1988) (*citing Eichholz v. Pub. Service Comm'n*, 306 U.S. 268, 269 (1939) (exercising jurisdiction over an appeal from a three-judge court's denial of a permanent injunction, despite the district court's decision to retain jurisdiction over defendant's counterclaim and referral of that claim to a master for an accounting)); *see also Robertson v. Bartels*, 122 S. Ct. 914 (2002) (exercising jurisdiction over grant of summary judgment to defendants on two claims even though a third claim remained pending in district court). The Jubelirer appellees have not cited a single case where this Court ruled otherwise. Nor have they explained when, under their theory, the three-judge court's dismissal of the partisan gerrymandering claims ever would have become appealable to

this Court under section 1253.[2] Accordingly, this Court should exercise jurisdiction over the dismissed partisan gerrymandering claims despite the fact that one entirely separate issue remained unresolved at the time of the appeal.[3]

The Schweiker appellees advance a slightly different jurisdictional argument, contending that the order of February 22, 2002 did not constitute a "final order" and thus should have been appealed within 30 days under 28 U.S.C. § 2101(b). *See* Schweiker Mot. to Dismiss or Affirm at 8. The February 22 order that forms the basis of this appeal, however, cannot be considered "interlocutory" for purposes of section 2101(b), and thus the 30-day deadline does not apply.

Here again, appellees cite no case that supports their statutory interpretation. Moreover, in *Robertson v. Bartels*, just last Term, precisely the same argument was raised in identical circumstances, but this Court exercised jurisdiction – affirming the judgment on the merits rather than dismissing the appeal. *See Robertson v. Bartels*, 148 F. Supp. 2d 443, 462 (D.N.J. 2001) (granting defendants summary judgment on two counts and referring a third count to a single judge for disposition), *summarily aff'd*, 122 S. Ct. 914 (2002) (affirming the judgment

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[2]*Cf. Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981) (regardless of terminology used, order is appealable as a denial of an injunction under 28 U.S.C. § 1292(a)(1) if it has the "practical effect of refusing an injunction" and appellant can show that order can only be effectually challenged through an immediate appeal).

[3]There can be no argument that the injunction against partisan gerrymandering sought by appellants was not yet "denied" because the same injunction might have been obtained using the still-pending one-person, one-vote theory. The latter theory only had the potential to support a quite different and more limited injunction, one merely requiring the State to eliminate or justify population deviations among districts. *See Karcher v. Daggett*, 462 U.S. 725, 731 (1983).

rather than dismissing on grounds of untimely appeal despite appellants' filing notice of appeal 43 days after the judgment); *see also* Motion to Dismiss or Affirm at 14-15, *Robertson v. Bartels*, No. 01-721 (U.S. Dec. 21, 2001).

The proper reading of section 2101(b) is that the 30-day deadline applies to grants or denials of preliminary injunctions and that all other appeals permitted under section 1253 – *i.e.*, appeals from grants or denials of permanent injunctions, whether preceding or coinciding with entry of a final judgment – are appeals from "final" orders and thus subject to the 60-day deadline. That is the rule that this Court has followed and that makes sense of the statutory scheme.

The Schweiker appellees' contrary view is based on a false analogy between the term "final" order in section 2101(b) and the term "final judgment" in Rule 54(b) of the Federal Rules of Civil Procedure. They argue that appellants could have obtained a final and appealable judgment on the partisan gerrymandering claims through a motion under Rule 54(b). But Rule 54 relates only to final judgment appeals under 28 U.S.C. § 1291. An "appellant need not obtain a certification under Rule 54(b) if the order entered by the district court falls under Section 1292(a)(1)." 11A C. Wright, A. Miller & M. Kane, *supra*, § 2962, at 412. The same rule clearly applies under section 1253. There never is any need to invoke Rule 54(b) as a predicate to an appeal from grant or denial of an injunction under section 1253, because the existence of a "judgment" is irrelevant. Accordingly, it makes no sense to interpret the term "final" order in section 2101(b) as referring to a final judgment. Instead, a final order is one that finally grants or denies a permanent injunction.

As appellants sought no preliminary injunction, and the district court's decision permanently disposed of plaintiffs'

gerrymandering claims for injunctive relief, the 60-day deadline applies and the appeal was timely.

II. UNDER THE DISTRICT COURT'S MISINTERPRETATION OF *BANDEMER*, NO VALID PARTISAN GERRYMANDERING CLAIM COULD EVER EXIST.

In requesting summary affirmance of the district court's dismissal of plaintiffs' partisan gerrymander claims, appellees never address the central flaw underlying that decision. The district court's application of *Bandemer* does not, as appellees suggest, merely erect a "strict" or "difficult" standard, *see* Jubelirer Mot. to Dismiss or Affirm at 10-11. Rather, under the district court's conception of partisan gerrymandering, the requirements of such a claim are, as a practical matter, *impossible* to meet. *See, e.g.*, J.S. App. 113a (Zappala, C.J., dissenting) ("If the record of [the state court challenge to Act 1] does not establish unconstitutional political gerrymandering, no such claim exists."); Daniel H. Lowenstein & Richard L. Hasen, *Election Law Cases and Materials* 10 (2d ed. 2002 Update) ("To say the least, it would be the rare case when a major political party could make and substantiate allegations of the sort that the *Vieth* court seems to require.").

It is almost unimaginable that the members of a major American political party could validly make the allegations deemed necessary by the district court – namely, that they "will be completely shut out of the political process." J.S. App. 22a. In so doing, they would be required to support a claim that someone has "prevented, or will . . . prevent [them], from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern." J.S. App. 27a (citing *Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988)). Even the most pervasively biased partisan gerrymanders will

not, by themselves, create "impediments to . . . full participation in the 'uninhibited, robust, wide-open' public debate on which our political system relies." *Id.* (quoting *Badham*, 694 F. Supp. at 670 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964))). Nor is it conceivable that either party would otherwise attempt to exclude the other altogether from the public forum.

Of course, if one party ever were able to inflict the improbable, extreme harms required by the district court's partisan gerrymandering standard, that conduct would be independently unconstitutional – regardless of the fairness or unfairness of any particular redistricting map. The First and Fourteenth Amendments obviously do not permit one party to "shut out" the other from public debate.[4]

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[4]*See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.") (internal quotation marks and citation omitted); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (per curiam) ("The First Amendment protects political association as well as political expression."); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the [First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office."); *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969) ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates."); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966) ("[T]he Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.").

It is therefore puzzling why any court would draw a linkage between partisan gerrymandering and extreme forms of interference with voting and campaigning. The partisan gerrymandering doctrine is not needed to provide protection for the rights to participate in a campaign and vote. Concomitantly, it is simply illogical to suppose that an extremely biased district map – one that effectively makes the votes of one party's adherents twice as influential as those of the other – is perfectly lawful unless and until grossly unconstitutional burdens on participation are added to the mix.

Notably, appellees never dispute appellants' argument that, under the district court's decision, no plaintiff ever could allege a valid political gerrymandering claim. At bottom, appellees' defense of the district court's decision thus is no different, as a practical matter, from their call for an outright overruling of *Bandemer*. *See* J.S. on Conditional Cross-Appeal No. 02-135 (asking Court to overrule *Bandemer* and hold that partisan gerrymandering claims are non-justiciable political questions); *see also* Schweiker Mot. to Dismiss or Affirm at 12 ("[T]here may well be doubts about the correctness of *Bandemer*'s holding that claims of partisan gerrymandering are justiciable at all."). As explained in response to appellees' conditional cross appeal, however, this Court in *Bandemer* properly recognized an independent, justiciable partisan gerrymandering claim. *See generally* Mot. to Dismiss Conditional Cross-Appeal No. 02-135.

If such a claim retains any vitality, it must have been properly asserted here. As appellants alleged in their Amended Complaint, the challenged congressional map creates one of the most egregious partisan gerrymanders in history, ensuring that one party will gain more than two-thirds of the State's congressional seats even with less than half of the popular vote,

see J.S. App. 125a-126a, drawing meandering, highly irregular districts across the State, *id.* 123a, ignoring all legitimate redistricting criteria, *id.*, and guaranteeing a Republican super-majority for at least a decade, *id.* 127a. That should be enough. Contrary to appellees' assertions and the district court's decision, plaintiffs' Amended Complaint alleged far more than a "mere lack of proportional representation." J.S. App. 23a. It alleged severe bias causing dilution of voting power based on political viewpoint, as well as indirect harms in the areas of "party organizing," "recruitment of viable candidates, fundraising and voter turnout," J.S. App. 128a, and it alleged that these problems will last at least a full decade, J.S. App. 127a.

Furthermore, as discussed in appellants' Jurisdictional Statement, the Court's recent racial gerrymandering decisions shed additional light on political gerrymandering claims. J.S. 23-26. Where, as here, a State draws bizarrely shaped congressional districts that maximize partisan advantage to the exclusion of all legitimate redistricting criteria, the Court's *Shaw* jurisprudence is instructive. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 644 (1993); *Miller v. Johnson*, 515 U.S. 900, 913 (1995). This is not to say, as appellees fear, that the two classes of claims are fully co-extensive; nor do appellants suggest that "'the intentional drawing of district boundaries for partisan ends . . . violates the Equal Protection Clause *in and of itself*.'" Jubelirer Mot. to Dismiss or Affirm at 17-18 (quoting *Bandemer*, 478 U.S. at 138-39) (emphasis added). But *Shaw* points the way to how, under the Equal Protection Clause, courts should differentiate between constitutional and unconstitutional degrees of political bias in maps – by considering whether other districting criteria were sacrificed to a paramount political agenda.

Similarly, although the Court has not yet applied Article I, Section 4 of the U.S. Constitution to political gerrymandering claims, several recent decisions of this Court confirm that States may not use their limited Article I powers to dictate the outcome of congressional elections. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995); *Cook v. Gralike*, 531 U.S. 510, 523 (2001). With passage of Act 1, the Pennsylvania General Assembly exceeded its narrow constitutional authority in this area.[5]

CONCLUSION

This Court should note probable jurisdiction.

Respectfully submitted,

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August 13, 2002

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[5]Contrary to appellees' assertions, *see* Jubelirer Mot. to Dismiss or Affirm at 20 n.9, plaintiffs clearly and thoroughly presented their Article I, Section 4 arguments to the district court in their Amended Complaint, *see* J.S. App. 131a, in Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss, at 7-12 ("Act I Is Inconsistent with Article I's Limitation of the States' Authority to Regulate Congressional Elections"), and in Plaintiffs' Motion for Clarification and/or Reconsideration.